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PHILADELPHIA LAW ASSOCIATION

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 124.

D. E. ROBERTS AND J. F. ELLIS, APPELLANTS,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED APRIL 8, 1891.

(14,571.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 12, 1894.

1 Pleas before the judges of the circuit court of the United States for the western district of Wisconsin, held at the United States court-room, in the city of Madison, Wisconsin, in the year of our Lord one thousand eight hundred and eighty-nine.

WESTERN DISTRICT OF WISCONSIN:

Be it remembered that heretofore, to wit, on the 12th day of December, A. D. 1889, the Northern Pacific Railroad Company filed in said court, before the judges thereof, its certain bill of complaint in equity against David E. Roberts, J. F. Ellis, and Euclid L. Johnson in the words and figures following, to wit:

Circuit Court of the United States for the Western District of Wisconsin.

THE NORTHERN PACIFIC RAILROAD COMPANY, Complainant,
vs.
DAVID E. ROBERTS, J. F. ELLIS, and EUCLID L. JOHNSON, Defendants.

To the honorable the judges of the circuit court of the United States for the western district of Wisconsin:

The Northern Pacific Railroad Company, a corporation duly organized and existing under and by virtue of that certain act of Congress approved July 2nd, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and under those subsequent acts and joint resolutions
2 of Congress relating to the same subject-matter, and having its principal office and place of business in New York city, in the State of New York, and being authorized by its charter to sue and be sued in all courts of law and equity within the United States, brings this its bill against David E. Roberts, J. F. Ellis, and Euclid L. Johnson, all of whom are citizens of the State of Wisconsin; and thereupon your orator complains and shows—

That in and by its said charter your orator was authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, as should be determined by your orator, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget sound, with a branch, via the valley of the Columbia river, to a point at or near Portland, in the State of Oregon; and was thereby vested with the powers, privileges, and immunities necessary to carry into effect the purposes of said act as therein set forth, and was, among other things, by its said charter and by the laws of this State duly authorized and em-

powered to purchase, acquire, and hold real estate in the State of Wisconsin.

That on or about the 7th day of September, A. D. 1880, your orator then having constructed its said railroad and telegraph line as far eastward as the point known as N. P. Junction, in the county of Carlton and State of Minnesota, and being about to hold a meeting of its board of directors, at its said principal office in the city of New York, to consider the extension of said line eastward
3 from said junction to some point on said Lake Superior, the board of supervisors of Douglas county, Wisconsin, at a meeting of said board duly held, duly passed and caused to be entered in the record of the proceedings of said county board the following resolution:

"Whereas this board has been informed that the Northern Pacific R. R. Co. is about to hold a meeting of its directors in the city of New York to consider the subject of an early extension of its main line of said road from the N. P. Junction eastward through this State; and

Whereas the prosperity of this county will be greatly influenced by the manner in which and the route upon which that road shall be extended through the county:

Resolved, That in the opinion of this board a line of road entering the State at some point between the St. Louis and Nemadji rivers and running thence all the way in Wisconsin, between said rivers, to a point on the bay of Superior at or near the mouth of Nemadji river, and thence along the said bay of Superior to Connor's point, with sufficient docks or piers suitable for the transfer of passengers and freight from its cars to lake-going craft, and from said craft to said cars, and depot at some point on said bay of Superior between said Nemadji river and Connor's point which said Northern Pacific Railroad Company may select, and an eastward extension, crossing the Nemadji river at or near its mouth, at a point that will afford to said N. P. Railroad Company the best and most profitable route for its business and best develop the county of Douglas and its resources; and

Resolved, That it is the duty and true policy of this board by every means in its power to promote the construction of the N. P. railroad, the main line thereof, or a connection therewith, upon substantially such route; and, therefore,
4 Resolved, That this board, in behalf of the county of Douglas, in aid of or inducement to the construction of a railroad at an early day in the manner and upon the route indicated in the foregoing resolutions, do hereby offer to the Northern Pacific R. R. Co. as follows:

Upon condition that said Northern Pacific Railroad Company shall within sixty days indicate to this board its acceptance of this proposal and within the year 1881 construct and complete such a railroad from the Northern Pacific Junction, running between the two rivers as aforesaid, to the bay of Superior at or near the mouth of the Nemadji river, and thence to Connor's point, along or near

the westerly side of said bay, with depot and convenient connection with dock or piers aforesaid, the county of Douglas will, as soon as said railroad shall be completed, within the year 1881, upon demand by said Northern Pacific Railroad Company, after such road shall have been so completed in the year 1881, and not otherwise, transfer by sufficient deed or deeds to said Northern Pacific Railroad Company all the alienable lands or lots belonging to said county of Douglas which have been acquired by deed to which said county has held undisputed title during two years last past; that in further aid of said road and upon like conditions, and to enable all persons interested in the county of Douglas to offer liberal contributions in aid of such road, this county will join in conveyance to said Northern Pacific Company by such interested persons of whatever lands said persons may contribute in in aid of such road, so that such contribution may be made without lien and free of all county incumbrance, and will co-operate in the most liberal manner consistent with law with all persons desirous of aiding this enterprise, so important in the development of the county; and it is hereby further

Resolved, That in case the said railroad shall cross the Nemadji river upon any county highway at or near the point hereinbefore named, the county will, if said railroad company will adopt a bridge which will accommodate common road traffic, unite with said company in construction of such bridge and thereby assume a part of the cost of construction.

Resolved, That time is of the essence of this proposal, and that unless the same shall be accepted within sixty days, and thereafter unless said road shall be completed before January 1st, 1882, then and in either event this proposal is and shall be void.

Resolved, That the county clerk be, and he is hereby, instructed to forward by mail a certified copy of the foregoing resolutions to the Northern Pacific Railroad Company, at their office in the city of New York."

And your orator further shows that on the 12th day of November, A. D. 1880, at a meeting of said county board, duly held, the following resolution was passed:

"Whereas by a resolution adopted September 7th, 1880, this board submitted to the Northern Pacific Railroad Company a proposition, of aid in the construction of a railroad in said resolution described, upon certain specified conditions, the acceptance of which proposition was limited to sixty days from the 17th day of September; and

Whereas at a meeting of said N. P. R. R. Co. held on the 17th day of September, 1880, among other matters said proposition was considered, and from such consideration this board has inferred that said company desires a longer time in which to signify its acceptance of said proposition, to wit, thirty days from and after November 17th, 1880; and

Whereas this board deems it expedient to comply with such desire:

Resolved, That the time fixed in the resolution of this board of September 7th, 1880, for the acceptance by the N. P. R. R. Co. of the proposition in said resolution contained be extended to the 18th day of December, 1880, and if such proposition be not accepted on or before said 18th day of December by a writing duly executed by said company, then the said proposition and this extension of the time of the acceptance thereof shall be void.

Resolved, That the county clerk be, and he is hereby, instructed to forward by mail a certified copy of the foregoing resolution to the Northern Pacific R. R. Co., at their office in the city of New York."

And your orator further shows that on the 16th day of December, A. D. 1880, at a meeting of the board of directors of your orator, duly held at its office in said city of New York, the following resolution was passed and adopted:

Whereas the board of supervisors of Douglas county, State of Wisconsin, in behalf of said county of Douglas and as aid of inducement to the construction at an early day of a railroad from the Northern Pacific Junction, running between the St. Louis and Nemadji rivers, to a point on the bay of Superior at or near the mouth of the Nemadji river, and thence to Connor's point, along or near the westerly side of said bay, with docks or piers suitable and convenient for the transfer of passengers and freight from cars to vessels and from vessels to cars, did, by resolutions unanimously adopted on the 7th day of September, 1880, offer to this company, upon condition that this company should within sixty days
7 indicate, in the manner therein provided, its acceptance thereof, and within the year 1881 construct and complete a railroad from the North Pacific Junction, running between the two rivers as aforesaid to the bay of Superior, at or near the mouth of the Nemadji river, and thence to Connor's point, along or near the westerly side of said bay, with depot and connection with docks and piers as aforesaid; that the said county of Douglas will, as soon as said railroad shall be completed within the year 1881, upon demand by this company, after such road shall have been so completed in the year 1881, and not otherwise, transfer by sufficient deed or deeds to this company all the alienable lands or lots belonging to said county of Douglas which had been acquired by deed, to which said county had held undisputed title during two years last preceding the said 7th day of September, 1880, and that said county will join in conveyance to this company by all persons interested in the said county of Douglas of whatever lands said persons may contribute in aid of such road, so that such contribution may be made without lien and free of all county incumbrance, and that said county will co-operate in the most liberal manner consistent with law with all persons desirous of aiding the enterprise, and that in case the said railroad or an eastern extension thereof shall cross the Nemadji river upon any county highway at or near its mouth at a point that will afford to this company the best and most profitable route for its business and best develop said

county of Douglas and its resources, the said county will, if the company shall adopt a bridge which will accommodate common road traffic, unite with this company in construction of such bridge and assume a part of the cost of construction;

And whereas, by a resolution of the said board of supervisors adopted on the 12th day of November, 1880, the terms fixed
8 in the said resolution of September 7th, 1880, for the acceptance by this company of the said proposition *was* extended to the 18th day of December, 1880, and it was therein declared that if said proposition be not accepted on or before the 18th day of December, 1880, by a writing duly executed by this company, then the said proposition and the said extension of the time of acceptance thereof shall be void:

Therefore, resolved, That this company will accept, and hereby does accept, the said proposition; and the president is requested and authorized to execute a written acceptance of said proposition for and in the name of the company, under its corporate seal and attested by the secretary, according to the terms of the resolution of said board of supervisors adopted on the 12th day of November, 1880."

That pursuant to said last-mentioned resolution a duly certified copy thereof was on the 16th day of December, A. D. 1880, forwarded to said county board of supervisors, together with a formal acceptance of said proposition, which acceptance was as follows:

"To the honorable the board of supervisors of Douglas county, Wisconsin:

The Northern Pacific Railroad Company hereby accepts the offers and propositions made to it by resolution of your honorable body adopted on the 7th day of September, A. D. 1880, on behalf of the said county of Douglas, in pursuance of and according to the recitals and resolution adopted by the board of directors of said company on the 16th day of December, A. D. 1880, a duly certified copy whereof is hereto annexed.

In testimony whereof the said Northern Pacific Railroad Company has caused these presents to be signed in its name by
9 its president and its corporate seal to be hereto affixed and attested by its secretary this sixteenth day of December, in the year one thousand eight hundred and eighty.

[SEAL.] NORTHERN PACIFIC RAILROAD COMPANY,
By FREDERICK BILLINGS, *President.*

Attest: SAM'L WILKINSON, *Sec'y.*"

And your orator futher shows that thereafter and on the 20th day of July, A. D. 1881, your orator having requested an extension of the time so limited for the completion of a certain portion of said line of railroad, the said county board by resolution, duly passed and adopted, so extended such time until the 31st day of December, 1882.

That pursuant to said proposition and the acceptance thereof by your orator and the contract thereby entered into between said Douglas county and your orator, your orator did, during the year A. D. 1881, construct, complete, and equip a line of railroad from said Northern Pacific Junction, entering the State of Wisconsin and running therein, between the St. Louis and Nemadji rivers, to the bay of Superior at or near the mouth of said Nemadji river, and thence to Connor's point, along or near the westerly side of the bay of Superior, with depot and docks and piers and convenient connections therewith, according to the terms and conditions of said agreement, and did fully perform all the terms and conditions of said contract on its part to be done and performed; that in so performing the conditions of said agreement on its part your orator expended large sums of money, to wit, in the construction of its main line from said N. P. Junction to Superior, with suitable and proper depots, side tracks, and connections, the sum of five
10 hundred and forty-two thousand and ninety-eight dollars and seventy-eight cents ($542,098.78); in the construction of said bay-front line to Connor's point, the sum of ninety-three thousand four hundred and twenty-three dollars and ninety-one cents ($93,423.91), and in the construction of a dock or pier in the bay of Superior at said Superior, near the mouth of said Nemadji river, with proper and suitable connections, the sum of one hundred and sixteen thousand two hundred and forty-nine dollars and seventy-three cents ($116,249.73).

That your orator, immediately upon the completion of said line of railroad, equipped and has ever since maintained and operated the same.

That, having so as aforesaid performed all the terms and conditions of said agreement on its part to be done and performed, your orator thereupon requested said board of supervisors of said Douglas county to make, execute, and deliver to it a proper deed of conveyance of the real estate in said proposition mentioned.

Whereupon said county board, at a meeting thereof duly held on the 18th day of January, A. D. 1882, passed and adopted the following resolution:

"Whereas the county of Douglas, by resolution of its board of supervisors passed the seventh day of September, A. D. 1880, and duly entered in their record of proceedings, offered and agreed to transfer to the Northern Pacific Railroad Company, in aid of the construction of its road to Superior, certain property held by said county, and in further aid of such road and to enable all persons interested in the county of Douglas to offer liberal contributions therefor, the said county further agreed to join in any conveyance to the aforesaid company made by such persons of what-
11 ever lands they might contribute in behalf of such road, so that their contributions should be without lien and free of all incumbrance, nevertheless upon the conditions that the Northern Pacific Railroad Company should within the year 1881 construct and equip a railroad from the Northern Pacific Junction,

entering the State of Wisconsin and running therein, between the St. Louis and Nemadji rivers, to the bay of Superior at or near the mouth of said Nemadji river, and thence to Connor's point, along or near the westerly side of the bay of Superior, with depot and convenient connection with docks or piers; and the said railroad company having, by resolution of its said board of directors and within the appointed time, duly accepted the offer and terms of agreement so as aforesaid made by and on the part of said county, and the said Northern Pacific Railroad Company having before the first day of January, A. D. 1882, constructed, completed, and equipped its railroad upon the line aforesaid from the junction above named, in Carlton county, Minnesota, to Connor's point, in the town of Superior, Wisconsin, with a depot and connections in the manner and way as stipulated, and having performed on its part the conditions of such agreement and requested the execution and delivery of the deed or deeds therein provided:

Therefore, resolved, That the county of Douglas release and convey to the Northern Pacific Railroad Company by quitclaim deed all lots, blocks, pieces, and parcels of land and premises heretofore conveyed to Horace S. Walbridge, James Bardon, and James B. Power, as trustees for said company, by Hiram S. Walbridge, James Stinson, Laurason Riggs, trustee, and James Stinson and Charles M. Counsel, trustees under the will of John Stinson, deceased,
12 which conveyances are duly of record in this county, and that the county clerk be, and he is hereby, directed to execute such release and conveyance in due form and to acknowledge and deliver the same to the said Northern Pacific Railroad Company. See Schedule "B," hereto attached.

Whereas the county of Douglas, by resolution of its board of supervisors, passed the seventh day of September, A. D. 1880, and duly recorded in their record of proceedings, offered and agreed to transfer by sufficient deed or deeds to the Northern Pacific Railroad Company all the alienable lands or lots belonging to said county of Douglas which had been acquired by deed, to which said county had held undisputed title during two years then last past, upon conditions that the said Northern Pacific Railroad Company should within the year 1881 construct, complete, and equip a railroad from the Northern Pacific Junction, entering the State of Wisconsin and running therein, between the St. Louis and Nemadji rivers, to Connor's point, along or near the westerly side of said bay, with depot and convenient connection with docks or piers; and

Whereas the Northern Pacific Railroad Company, by resolution of its board of directors and within the time specified, duly accepted in writing the offer and terms of agreement so as aforesaid made by and on the part of Douglas county, and did before the first day of January, A. D. 1882, construct, complete, and equip a railroad upon the line aforesaid from the Northern Pacific Junction, so called, in Carlton county, Minnesota, to Connor's point, in the town of Superior, Wisconsin, with a depot and connections, in the way and manner stipulated as aforesaid, and has performed on its part

the conditions of such agreement and requested the execution of the deed or deeds therein provided:

13 Resolved, therefore, That the county of Douglas, in pursuance to said agreement, release and convey to the Northern Pacific Railroad Company by quitclaim deed all the lots, blocks, pieces, and parcels of land and premises described in Schedule "A," hereto attached, and that the county clerk be, and he is hereby, ordered to execute, acknowledge, and deliver such deed to said company for the same."

That "Schedule A," in said last-named resolution mentioned, comprised, among other lands and premises therein described, the lands and premises hereinafter mentioned and described and which are the subject-matter of this suit; that thereafter and on the 20th day of January, A. D. 1882, pursuant to and by virtue of the authority and instructions contained in said last-mentioned resolution, the county clerk of said Douglas county made, executed, and delivered to your orator the following deed, to wit:

"Whereas, the county of Douglas by resolution of its board of supervisors passed on the 7th day of September A. D. 1880 and duly entered in their record of proceedings, offered and agreed to transfer by good and sufficient deed or deeds, to the Northern Pacific Railroad Company, all the alienable lands or lots belonging to the said county of Douglas, which had been acquired by deed, and to which said county had held undisputed title during two years then last passed, upon condition that said Northern Pacific Railroad Company should, within the year 1881, construct, complete and equip a railroad from the Northern Pacific junction entering the State of Wisconsin and running therein between the St. Louis and Nemadji rivers to the bay of Superior, at or near the mouth of the Nemadji river, and thence to Connor's point, along or near

14 the westerly side of said bay with a depot and convenient connections with docks or piers; and

Whereas, the Northern Pacific Railroad Company by resolution of its board of directors, and within the time above specified, duly accepted the offer and terms of agreement so as aforesaid made by and on the part of Douglas county, and did before the 1st day of January, 1882, construct and complete and equip a railroad upon the line aforesaid, from the Northern Pacific Junction, so called, in Carlton county, Minnesota, to Connor's point and the town of Superior, Wisconsin, and a depot, and connections aforesaid, in the manner and way as stipulated, and has performed on its part the conditions of such agreement, and has requested the execution and delivery of a deed or deeds, as therein provided,

Now, therefore, know all men by these presents, that the county of Douglas in the State of Wisconsin, grantor, hereby quitclaims to the Northern Pacific Railroad Company, grantee, in consideration of the premises, and for the sum of one dollar in hand paid by said grantee, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, all those certain lots, blocks, pieces and parcels of land and premises, situate and being in

the county of Douglas, aforesaid, and particularly described as follows, namely: * * * All in the county of Douglas and State of Wisconsin, together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to have and to hold the above granted and described lands and premises, with the hereditaments and appurtenances unto the said grantee, the
15 Northern Pacific Railroad Company and unto its successors and assigns forever.

In testimony whereof, I, George F. Holcolm, county clerk of the county of Douglas, State of Wisconsin, have executed this deed pursuant to and in virtue of the authority in me vested, by the statutes of the State of Wisconsin, and by order of the board of supervisors of said county, of record in my office, and for and on behalf of said county of Douglas aforesaid, and have hereto subscribed my name officially, and affixed the seal of said board of supervisors and of said county, and my seal, at Superior, in said county of Douglas, this twentieth (20) day of January, in the year of our Lord, one thousand, eight hundred and eighty-two (1882).

GEORGE F. HOLCOMB, [SEAL.]
County Clerk of the County of Douglas,
in the State of Wisconsin.

[County Seal.]

Done in presence of—
THOMPSON RITCHIE.
H. E. LAFFITTE.

STATE OF WISCONSIN,)
Douglas County,) *ss:*

Personally came before me this 20th day of January, 1882, the within and above named George F. Holcomb, county clerk of said county of Douglas, to me known to be the person who executed the within and foregoing instrument, and acknowledged the same.

[SEAL.] THOMPSON RITCHIE,
Notary Public, Douglas County, Wisconsin.

Which said deed was thereafter and on the 20th day of January, A. D. 1882, recorded in the office of the register of deeds for Douglas county, in Book Q of Deeds, on pages 42 *et seq.*

16 That in and by said deed the State of Wisconsin and county of Douglas conveyed and quitclaimed unto your orator, its successors and assigns forever, among other lands and premises, all those certain pieces and parcels of land situate, lying, and being in the county of Douglas and State of Wisconsin, described as follows, to wit:

Lots 153, 217, 253, 257, 259, 339, 371, 414, 416, 468, 469, 473, on West First street.

Lot 58, on West Second street.

Lot 399, on West Third street.

Lots 8, 428, 434, 455, 457, on West Fourth street.

Lots 68, 78, 427, 431, fr. on West Fifth street.

Lots 7, 19, 70, 75, 395, on West Sixth street.

Lots 11, 39, 45, 47, 72, 83, 84, 85, 89, 192, 205, 207, 251, 254, 255, 256, 300, 329, 331, 357, on West Seventh street.

Lots 29, 32, 37, 38, 40, 53, 59, 62, 110, 133, 148, 168, 172, 174, 194, 276, 285, 287, 288, 320, 368, 371, 380, 390, on West Eighth street.

Lots 3, 5, 33, 35, 37, 65, 67, 69, 100, 121, 124, 126, 128, 132, 134, 147, 149, 151, 168, 170, 172, 239, 241, 284, 376, 388, 389, 398, on West Ninth street.

Lots 5, 7, 9, 23, 27, 129, 161, 163, 399, on West Tenth street.

The southeast quarter of block 27, on West Thirteenth street.

Blocks 22 and 27, on West Fifteenth street.

The northeast quarter of block 4, the southwest quarter of block 12, the southwest quarter of block 21, the south half of block 24, and the northwest quarter of block 24, on West Seventeenth street.

17 The northwest quarter of block 5, the southeast quarter of block 30, and the east half of block 32, on West Nineteenth street.

The east half of block 9, the east half of block 10, and the West half of block 28, on West Twenty-first street.

The northeast quarter of block 7, the southeast quarter of block 9, and the west half of block 26, on West Twenty-third street.

Block 1, the northwest quarter of block 7, blocks 8 and 13, and the southwest quarter of block 22, on West Twenty-fifth street.

The north half of block 13 and the southeast quarter of block 28, on West Twenty-seventh street.

The southeast quarter of block 12, the southeast quarter of block 27, and the southwest quarter of block 29, on West Twenty-ninth street.

The northeast quarter of block 17, the southwest quarter of block 17, and the east half of block 33, on West Thirty-first street.

The southeast quarter of block 18, block 24, the west half of block 33, and block 39, on West Thirty-third street.

The northwest quarter of block 20, block 35, the north half of block 36, and the southeast quarter of block 36, on West Thirty-fifth street.

The north half of block 38, and block 42, on West Thirty-seventh street.

Block 8, the southeast quarter of block 14, the northwest quarter of block 14, the northwest quarter of block 15, the northwest quarter of block 16, on West Forty-first street.

The south half of block 11, on West Forty-fifth street.

Blocks 30 and 32, on East First street.

Lots 105, 195, 197, 199, 212, 221, 418, 520, 529, 533, 540, 550, 554, 556, 558, 563, 570, 572, the east quarter of block 41, and the undivided half of the west quarter of block 44, on East Second

18 street.

Blocks 13 and 67, on East Third street.

Blocks 13 and 15, on East Fourth street.

Blocks 38 and 54, on East Fifth street.

Blocks 28 and 66, on East Sixth street.

Blocks 3 and 43, on East Seventh street.

Blocks 30 and 54, on East Eighth street.
The west half of block 1 and blocks 40 and 44, on East Ninth street.
Block 32, on East Eleventh street.
Blocks 20, 22, 34, and 42, the west third of block 46, and block 49, on East Twelfth street.
Blocks 37 and 50, on East Thirteenth street.
Block 18, on East Fourteenth street.
Blocks 29, 31, and 43, on East Fifteenth street.
Block 32, on East Sixteenth street.
Block 12, on East Seventh street.
Block 21, on East Eighteenth street.
Block 26, fractional, on East Nineteenth street.
The undivided quarter of block 6, on East Twenty-first street.
The south half of the east half of block 6, and the south half of block 12, on East Twenty-third street.
Block 19, on East Twenty-fifth street.
Lots 14, 28, 30, 32, 42, and 79, on West Itasca street.
Lots 1, 5, 15, 18, and 24, on West St. Croix street.
Lots 17, 19, 21, 30, 32, 77, 79, 81, 83, 85, 87, 89, 91, 93, 343, 393, 469, 487, on West Bay street.
Lots 41, 43, 57, 59, 69, 71, 73, 75, 77, and 79, on West Michigan street.
Lots 62, 64, 67, 79, 101, 103, and 105, on West Huron street.
Lots 26, 28, 50, 54, 70, and 118, on West St. Clair street.
Lots 76, 80, and 106, on West Erie street.
19 Lots 4, 7, 8, 16, and 26, on West Ontario street.
Blocks 13, 14, 15, 16, 18, 19, 21, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35, the west half of block 36, and blocks 58, 60, and 69, on East Itasca street.
Lots 3, 4, 5, 7, and 8 and blocks 8, 13, 14, 15, 16, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 49, 59, and 64, on East St. Croix street.
Blocks 12, 13, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 41, and 65, the northeast quarter of block 67, and blocks 74 and 76, on East Bay street.
Lots 4, 22, 26, and 30 and blocks 29, 30, 31, 33, 34, 35, 36, 38, 39, 40, 67, 73, 75, and 80, on East Michigan street.
Lot 4 and blocks 31, 37, 39, and 88, on East Huron street.
Blocks 75, 101, and 103, on Winnebago street.
Blocks 43, 46, 47, 48, 49, 51, 52, 66, 72, and 98, on Baltic street.
Blocks 63, 82, 85, and 93, on Caspian street.
Blocks 81, 83, 106, and 112, on Azof street.
Blocks 74, 75, 105, and 106, on Pepin street.
Blocks 75, 85, 87, 98, 100, and 118 on Boden street.
Block 94, on Amazon street.
Blocks 93, 94, and 100, on Geneva street.
Blocks 107 and 112, on Pontchartrain street.
Blocks 52 and 65, on East St. Clair street.
Block 49, on East Erie street.
Block 74, on East Ontario street.
Blocks 48 and 90, on Champlain street.

Blocks 48, 73, and 89, on St. George street.
Block 45, on Cayuga street.
Block 104, on Seneca street.
Blocks 42, 50, and 73, on Winnebago street.
Lot 23, on Robertson avenue.
Lots 36, 42, and 48, on Walker avenue.
Block 21, on Water street.
The west half of block 8, on St. Paul street.
Lots 25, 26, 28, 37, 79, 81, 88, 90, 138, 168, 170, 200, 213, 234, and 235; the undivided half of lot 262; the undivided half of lot 264; the undivided half of lot 266; the undivided half of lot 267; the undivided half of lot 268; the undivided half of lot 269, and lots 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 299, 301, 313, 314, 315, 316, 317, 319, 320, 349, 350, 403, and 407, on River street.
Lots 7 and 29, on Oswego pier.
Lot 3, on Chicago pier.
Lots 21, 29, and 33, on Milwaukee pier.
Lots 2, 3, and 4, on Detroit pier.
Lot 7, on Quebec pier.
Lot 23, on Montreal pier.
Lot 14, on Monroe pier.
Lots 3, 4, 6, and 17, on Hamilton pier.
Lots 15, 17, and 22, on Dunkirk pier.
Lots 13, 16, 17, 20, 21, 24, and 25, on Kingston pier.
All in the town site of Superior (now in the city of Superior), according to the plat of said town site recorded in the office of the register of deeds in and for the said county of Douglas.

Ely's addition.

Lots 470, 507, and 524, fractional, on Third street.
Lots 444, 517, 519, and 533, on Fourth street.
Lots 435, 441, 472, 493, 538, 543, and 544, on Fifth street.
Lots 409, 449, 451, 493, 495, 518, 520, 522, 524, 544, 571, 578, and 580, on Sixth street.
Lots 381, 383, 419, 431, 460, 482, 577, 578, 582, 584, and 592, on Seventh street.
Lots 386, 388, 436, 440, 460, 462, 464, 474, 476, 478, 480, 482, 484, 486, 488, 498, 500, 504, 521, 523, 544, 551, 587, 589, 591, 600, 604, and 607, on Eighth street.
Lots 397, 399, 401, 405, 407, 408, 460, 494, 509, 510, 511, 512, 526, 546, 576, and 587, on Ninth street.
Lots 449, 450, 452, 454, 513, 529, 531, 551, 553, 554, 563, and 569, on Tenth street.
Lots 433, 439, and 458, on Eleventh street.
Lots 451, 453, 483, and 498, on Twelfth street.
Lots 487, 489, and 491, on Thirteenth street, in Ely's addition to Superior (now in the city of Superior), according to the plat of said Ely's addition recorded in the office of the register of deeds in and for the said county of Douglas.

Lands.

The southeast quarter of section 17, in township 48, range 14 west.

The undivided half of the southeast quarter of section 35 and the northwest quarter of section 36, in township 48, range 13 west.

The west half of the northeast quarter of the southwest quarter and the undivided two-thirds of the west half of the northwest quarter of section 7, in township 48, range 12 west.

The west half of the southwest quarter and the southwest quarter of the northwest quarter of section 36, in township 48, range 11 west.

The northwest quarter of section 2 and the north half of the southeast quarter and the southeast quarter of the southeast quarter of section 24, in township 47, range 14 west.

22 The west half of the northwest quarter and the northeast quarter of the northwest quarter of section 6, the north half of the southwest quarter and an undivided thirty acres in the south half of the northwest quarter of section 17, and the northwest quarter of the northeast quarter, the east half of the northeast quarter, the southwest quarter of the northeast quarter, the east half of the southeast quarter, the northwest quarter of the southeast quarter, and the east half of the northwest quarter of section 30, in township 47, range 13 west, and the south half of the northwest quarter of section 4, in township 47, range 12 west.

Whereby your orator became the owner in fee-simple absolute of said real estate and ever since has been and still is the owner and holder thereof.

And your orator, by way of deraignment of its title to said lands and premises, further shows unto your honors—

That among other sources of title it claims title to said lands and premises under and by virtue of the following tax deeds, to wit:

That certain tax deed issuing from the State of Wisconsin and Douglas county as grantors to the said Douglas county as grantee, bearing date the 16th day of May, A. D. 1874, and recorded in the office of the register of deeds for said Douglas county on the 18th day of May, A. D. 1874, in Book 1 of Tax Deeds, on pages 568 *et seq.*

Also that certain other tax deed issuing from the State of Wisconsin and Douglas county as grantors to the said Douglas county as grantee, bearing date the 30th day of May, A. D. 1877, and recorded in the office of the register of deeds for said Douglas county on the 30th day of May, A. D. 1877, in Book 1 of Tax Deeds,

23 on page 616.

Also that certain other tax deed issuing from the State of Wisconsin and Douglas county as grantors to the said Douglas county as grantee, bearing date 30th day of May, A. D. 1877, and recorded in the office of the register of deeds for said Douglas county on the 30th day of May, A. D. 1877, in Book 1 of Tax Deeds, on page 618.

Also that certain other tax deed issuing from the State of Wisconsin and Douglas county as grantors to the said Douglas county

as grantee, bearing date the 6th day of August, 1877, and recorded in the office of the register of deeds for said Douglas county on the 8th day of August, A. D. 1877, in Book 3 of Tax Deeds, on page 1.

And your orator further shows that each of said tax deeds hereinbefore mentioned and so recorded as aforesaid is fair upon its face and is made, executed, and acknowledged in due form as prescribed by the laws of the State of Wisconsin; that said deeds and each of them have been so of record as aforesaid for more than three years.

And that your orator relies upon said tax deeds and upon each and every thereof as a source of title and will rely upon the same at the trial hereof and upon the record of the same and upon the statutes of limitations in such case from time to time made and provided by the legislature of the State of Wisconsin limiting the time within which such deeds might be impeached or invalidated, and more particularly upon section 5, chapter 138, of the Laws of 1861 and sections 1188 and 1210*d* of the Revised Statutes of the State of Wisconsin for the year 1878 and the acts of the
24 legislature of said State amendatory thereof and supplementary thereto.

And your orator further shows that all of said resolutions, conveyances, and instruments hereinbefore mentioned and set forth are duly of record in said Douglas county and to which said instruments and the records thereof your orator begs leave for greater certainty to refer, as well as to certain and sundry other ancillary and confirmatory instruments and conveyances and the record thereof not herein specifically mentioned and set forth, but which your orator prays leave to produce and exhibit unto your honors upon the trial of this cause in support of its said title to said lands and premises.

And your orator further shows that of said described pieces and parcels of land the following—that is to say, lots 217, 339, 371, 469, and 473, on West First street; lots 14, 28, 30, 32, and 42, on West Itasca street; blocks 13, 15, 19, 21, 23, 27, 29, 31, 33, and 69, on East Itasca street; lots 26, 28, and 37, on River street, and lots 2, 3, and 4, on Detroit pier—are and during all the time since the same were so deeded to your orator by said Douglas county have been in the actual possession, use, and occupancy of your orator; that in the year A. D. 1881 your orator constructed its said railway upon said last described lots and blocks and has ever since that time used and occupied the same for the purposes of maintaining and operating its said railway; that said described parcels of land so in the possession and occupancy of your orator are of great value, to wit, of the value of more than ten thousand dollars, and that the possession, use, and occupancy of the same are indispensable to your orator in the maintenance and operation of its said railroad.

And your orator further shows that as to the remainder of said pieces and parcels of land the same were at the time of the
25 execution of said tax deeds and ever since have been vacant and unoccupied and not in the possession of any one whom-

soever, save in so far forth as the same have been in the constructive possession of your orator and its grantor, the said Douglas county, by operation of law, and that the same are of great value, to wit, of the value of over two hundred thousand dollars.

And your orator further shows unto your honors that at the time said proposition was so made as aforesaid by said Douglas county to your orator the said lands and premises had no market value whatever; that said county board was unable to sell the same for the amount of the tax lien thereon or for any sum whatever, and that the same, being the lands of the county, were non-taxable and no income whatever could be derived therefrom.

That ever since the same were so conveyed to your orator as aforesaid your orator has in each and every year paid the taxes levied thereon and has expended large sums of money in the payment of such taxes, to wit, more than five thousand dollars.

That by reason of the construction and operation of your orator's said line of railroad into said Douglas county the said described real estate, together with all other real estate in said county, has greatly appreciated in value, and large revenues have been derived and valuable improvements have been made from the increased taxes levied and paid thereon.

And your orator further shows that the legislature of said State of Wisconsin, in and by chapter 150 of the laws of said State for the year 1883, approved and ratified the act of said Douglas county in so contracting with your orator as aforesaid and in so conveying to your orator said lands and premises, and therein declared said conveyance to be valid and effectual to vest in
26 your orator the lands conveyed or attempted to be conveyed by said deed, to which said act of the legislature your orator, for greater certainty, prays leave to refer.

And your orator further shows that its title to said lands remained undisputed by any one during all the time from said 20th day of January, A. D. 1882, until the month of July, A. D. 1888, and that said board of supervisors of said Douglas county has not nor has any person instituted or commenced any action or proceeding to divest your orator of the title to said lands and premises so conveyed to it.

That in the meantime and since said 20th day of January, A. D. 1882, your orator has in good faith sold and conveyed to divers and sundry persons purchasing the same in good faith and for valuable considerations a large number of the parcels of land so conveyed to it and whose titles are based upon said deed to your orator, and your orator had well hoped that no disputes would have arisen touching the said parcels of land or any thereof or the title thereto.

But now so it is, may it please your honors, that the said defendants, combining and confederating with divers persons at present unknown to your orator, whose names when discovered your orator prays may be inserted herein, with apt words to charge them as parties defendant hereto, and contriving how to injure and wrong your orator, wrongfully and unlawfully and with intent to injure

your orator and cloud its title and the title of its grantees to the said lands and premises, and with intent and purpose to involve said title in litigation and strife and to hinder and prevent your orator in selling and disposing of said parcels of land or any
27 thereof, did, on or about the 6th day of July, A. D. 1888, induce and procure the board of supervisors of said Douglas county to pretend to sell to said defendant Roberts for the nominal sum of three hundred and thirty-five dollars all the said pieces and parcels of land so theretofore conveyed to your orator as aforesaid, and on said 6th day of July, A. D. 1888, the county clerk of said county did, pursuant to a resolution of said board, make, execute, and deliver to said defendant Roberts a pretended deed of said pieces and parcels of land, which said last-mentioned deed bears date on said 6th day of July, A. D. 1888, and is recorded in the office of said register of deeds for said Douglas county, in Book 3 of Deeds, on pages 345 *et seq.*

That said last-mentioned deed omitted several of the parcels of land which had been theretofore conveyed to your orator and which were intended to be included therein, and that to cover said omitted parcels a second deed was issued by said clerk to said defendant Roberts, which said second deed bears date the 7th day of March, A. D. 1889, and is recorded in the office of said register of deeds in Book S of Deeds, on page 699, and that the said defendant Roberts paid to said Douglas county for said second deed the sum of fifty dollars.

And your orator further shows that said last-mentioned two deeds to said Roberts cover and embrace, among other lands and premises, all the pieces and parcels of land hereinbefore mentioned and described.

That notwithstanding said lands and premises were on the said 6th day of July, 1888, and ever since have been of the value of over two hundred thousand dollars, the consideration paid to said county therefor by said Roberts was the sum of three hundred and eighty-five dollars and no more.

And your orator further shows unto your honors that said defendants sometimes allege and pretend to claim title to cer-
28 tain of said pieces and parcels of land hereinbefore described under a certain tax deed to said Roberts, bearing date July 12, 1888, and recorded in the office of said register of deeds July 17, 1888, in Book 3 of Tax Deeds, on page 343; to which said deed and the record thereof your orator prays leave to refer for greater certainty and for a more particular description of the pieces and parcels of land therein described.

But your orator avers and shows unto your honors that the certificates upon which said pretended tax deed was so issued to said defendant Roberts were certificates issued to said Douglas county upon the tax sale of the year A. D. 1877 for the taxes of 1876, and that said certificates were held by said county at the time when it conveyed said lands and premises to your orator, as hereinbefore set forth, and that any claim of title based upon said certificates passed to your orator by said conveyance.

Notwithstanding which, the said defendants, further contriving to cloud your orator's title to such of said lands and premises as are embraced in said pretended tax deed of July 12th, 1888, sometimes allege and pretend that the said certificates upon which said deed issued were duly assigned to said Roberts by said Douglas county for a valuable consideration, to wit, for the amount of the tax liens evidenced by said certificates.

Whereas your orator avers and so charges the fact to be that the defendants wrongfully procured the said certificates to be assigned to said Roberts and the said pretended tax deed thereon to be issued to him at or about the same time that he procured said quitclaim deed of July 6th, 1888, and without the payment of any consideration whatever other than the amount paid for said quitclaim deed as hereinbefore set forth.

And your orator further shows that since the execution of said pretended deeds to said defendant Roberts the said Roberts
29 has made, executed, and delivered to the defendant J. F. Ellis a pretended quitclaim deed of a portion of said lands and premises, which said last-mentioned deed was recorded in the office of the register of deeds for said Douglas county on the 8th day of April, A. D. 1889, in Book 9 of Deeds, on page 216, and has made, executed, and delivered to said defendant Euclid L. Johnson a pretended quitclaim deed of certain other of said lands and premises, which said last-mentioned deed was recorded in the office of the said register of deeds on the 31st day of July, A. D. 1888, in Book 4 of Deeds, on page 302, and has executed and delivered to said Johnson a certain other pretended quitclaim deed of certain other of said lands and premises, which said last-mentioned deed is recorded in the office of said register of deeds in Book 8 of Deeds, on page 310, and that said Roberts still claims to own the remainder of said lands not so deeded by him to said Ellis and Johnson, to which said pretended deeds and the records thereof your orator prays leave to refer for greater certainty and for more particular description of the portions of said lands and premises attempted to be conveyed thereby and by each of them.

And your orator further shows unto your honors that said pretended quitclaim deeds from said Douglas county to said Roberts and from said Roberts to said Ellis and said Johnson, so recorded as aforesaid, are fair upon their face and are executed and acknowledged in due form of law so as to be entitled to record, and being so recorded as aforesaid are and remain a cloud upon the title of your orator to said lands and premises, and that by said unjust and wrongful acts of the defendants the title of your orator to said lands and premises is cast in doubt and any sale of the same or any part thereof prevented and your orator thereby deprived of the enjoyment and profit thereof.

30 To the end, therefore, that the defendants may answer the premises (answer under oath being hereby expressly waived) and show cause, if any they have, why the relief herein prayed be not granted—that is to say, that by the proper judgment and decree of this honorable court the title to said lands and premises be

quieted in the complainant and its claim of title to said lands and premises and to each and every part thereof be established against any claim of the defendants or either of them thereto, and that the defendants and each of them and all persons claiming under them or either of them subsequent to the commencement of this suit be forever barred against having or claiming any right or title to said land or any thereof adversely to the complainant, and declaring said pretended deeds from said Douglass county to said Roberts and from said Roberts to said Johnson and said Ellis and each and every of them to be null and void and of no effect, and that your orator have such other or further decree, order, or relief as to your honors may seem equitable and just in the premises—

May it please your honors to grant unto your orator the writ of subpœna of the United States of America, issuing under the seal of your honorable court, directed to the said defendants, David E. Roberts, J. F. Ellis, and Euclid L. Johnson, and each of them, and commanding them and each of them, under pains and penalties to be specified in said writ, to be and appear before your honors in your honorable court aforesaid, at a day specified in said writ, and then and there to answer the premises and do and abide the decree of your honors touching the same; and, as in duty bound, your honors will ever pray, &c.

CATLIN & BUTLER,
Solicitors for Complainant.

JAMES McNAUGHT,
I. C. SLOAN,
Of Counsel.

31 Thereupon a subpœna was issued by the clerk of said court out of and under the seal thereof, directed and delivered to the marshal of said district for service; which said subpœna and the return of said marshal endorsed thereon are in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, }
Western District of Wisconsin, } *ss:*

The President of the United States of America to David E. Roberts, J. F. Ellis, and Euclid L. Johnson, Greeting:

You are hereby commanded that you personally appear before the judges of the circuit court of the United States of America for the western district of Wisconsin, in our court of chancery in and for the district aforesaid, on the first Monday of Feb'y next ensuing, at Madison, to answer to a bill of complaint exhibited against you in our said court by the Northern Pacific Railroad Company, and to do further and receive what our said court shall have considered in that behalf, and this you are not to omit under the penalty which may ensue.

This process of subpœna is directed to the marshal of this district, who is hereby commanded to serve the same upon the said David E. Roberts, J. F. Ellis, and Euclid L. Johnson, if to be found in his district, and due return thereof make.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the city of Madison, in the said district, this 12 day of December, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the one hundred and fourteenth.

[L. S.] F. M. STEWART, *Clerk.*

CATLIN & BUTLER,
Compl't's Solicitors.
JAMES McNAUGHT,
I. C. SLOAN,
Of Counsel.

It is ordered by our said court that the said David E. Roberts, J. F. Ellis, and Euclid L. Johnson, the defendants aforesaid,
32 do enter their appearance in this suit, in the clerk's office, on or before the day and time at which this subpœna is returnable as aforesaid; otherwise the bill filed may be taken as confessed.

F. M. STEWART, *Clerk.*

Served on the within-named Euclid L. Johnson by delivering to him personally a copy of this subpœna this 14th day of December, 1889.

D. C. FULTON, *Marshal,*
By DAN. KENNEDY, *Deputy.*

Served on the within-named David E. Roberts by delivering to him personally a copy of this subpœna this 16th day of December, 1889.

D. C. FULTON, *Marshal,*
By DAN. KENNEDY, *Deputy.*

Served on the within-named J. F. Ellis by delivering and leaving a copy of this subpœna at his — to his clerk this 19th day of December, 1889.

D. C. FULTON, *Marshal,*
By VICTOR WOLF, *Deputy.*

Served on the within-named J. F. Ellis by delivering to him personally a copy of this subpœna this 23d day of December, 1889.

D. C. FULTON, *Marshal,*
By VICTOR WOLF, *Deputy.*

Fees.

Service	6 00
Copies	1 20
Travel	31 74
	38 94

33 And thereupon and on the 6th day of January, A. D. 1890, the defendants filed their appearance in this suit in the words and figures following, to wit:

"In the United States Circuit Court in and for the Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY *vs.* DAVID E. ROBERTS, J. F. ELLIS, and EUCLID L. JOHNSON.	Jan'y Term, 1890. Equity.

To the clerk of said court:

In the above cause please enter the names of David E. Roberts, J. F. Ellis, and Euclid L. Johnson as defendants and of myself as their solicitor as of the date of the filing hereof.

W. F. BAILEY,
Solicitor for the Defendants, Eau Claire, Wis."

And thereupon the defendant Euclid L. Johnson on the 28th day of January, A. D. 1890, entered his appearance in this suit in the words and figures following, to wit:

"In the United States Circuit Court in and for the Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY *vs.* DAVID E. ROBERTS, J. F. ELLIS, and EUCLID L. JOHNSON.	Jan'y Term, 1890. Equity.

34 To the clerk of said court:

In the above cause please enter the name of Euclid L. Johnson as defendant and of myself as his solicitor as of the date of the filing hereof.

W. F. BAILEY,
Sol. for Def't Johnson, Eau Claire, Wisconsin."

And thereupon the defendant David E. Roberts on the 28th day of January, A. D. 1890, entered his appearance in this suit in the words and figures following, to wit:

"In the United States Circuit Court in and for the Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY *vs.* DAVID E. ROBERTS, J. F. ELLIS, and EUCLID L. JOHNSON.	Jan'y Term, 1890. Equity.

To the clerk of said court:

In the above cause please enter the name of David E. Roberts as defendant and of myself as his solicitor as of the date of the filing hereof.

W. F. BAILEY,
Sol. for Def't Roberts, Eau Claire, Wisconsin."

And thereupon the defendant J. F. Ellis on the 28th day of January, A. D. 1890, filed his demurrer and plea in this suit in the words and figures following, to wit:

35 "In the United States Circuit Court in and for the Western District of Wisconsin.

THE NORTHERN PACIFIC RAILROAD COMPANY, Complainant,
vs.
DAVID E. ROBERTS, J. F. ELLIS, and EUCLID L. JOHNSON, Defendants.

Demurrer and Plea of Defendant J. F. Ellis.

This defendant says that he is advised that there is good cause for demurrer to said bill, and he demurs accordingly and for cause of demurrer says:

First. That said bill contains no matter of equity whereon this court can ground any decree or give complainant any relief as against this defendant.

Second. That it appears by said bill that the same is exhibited by the complainant against this defendant and David E. Roberts and Euclid L. Johnson as defendants thereto for several distinct matters and causes, in many whereof, as appears by said bill, this defendant is in no way interested, and by reason of such distinct matters the said bill is drawn out to a considerable length, and this defendant is compelled to be put at charges in respect thereof, and by joining distinct matters together which do not depend upon each other the proceedings in the progress of the said suit will be intricate and prolix and this defendant put to unnecessary charges and expenses in matters which in no way relate to or concern him.

Wherefore this defendant demurs thereto and craves judg-
36 ment of the court whether he shall make answer to the said bill otherwise than as aforesaid, and he prays to be hence dismissed with his costs and charges in this behalf most properly sustained.

W. F. BAILEY,
Solicitor for Def't J. F. Ellis.

STATE OF WISCONSIN, } ss:
Eau Claire County, }

Defendant J. F. Ellis makes oath that the foregoing demurrer is not interposed for delay of the cause in which it is filed.

J. F. ELLIS.

Subscribed and sworn to before me this 27th day of January, A. D. 1890.

CHARLES W. FISKE,
Notary Public, Wis.

I hereby certify, as counsel for the defendant J. F. Ellis in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper to be filed.

W. F. BAILEY,
Solicitor for Def't J. F. Ellis.

This defendant, not confessing all or any of the matters in said bill of complaint to be true as therein alleged, for plea to so much of said bill as alleges or pretends to state a cause of action against this defendant avers and says:

First. That none of the lots or tracts of land mentioned and described in the said bill of complaint, which were conveyed by the said D. E. Roberts to him, the said defendant, J. F. Ellis, were, at the time of the commencement of this action or at any time prior or subsequent to such time, occupied by or in the possession of the complainant, or any part or portion thereof.

That the said defendant further shows to your honors that
37 of the lands mentioned and described in said bill of complaint the following only were conveyed to the defendant Ellis by said Roberts:

In Douglas county, Wisconsin.

Town lot 217 on West 1st street; lot 399 on West 3rd street; lots 8 & 455 on West 4th street; lot 68 on West 5th street; lots 70, 75, & 256 on West 6th street; lots 72 & 192 on West 7th street; lots 38, 40, 110, & 276 on West 8th street; lots 3, 5, 33, 35, 37, 168, 170, & 172 on West 9th street; lot 487 on West Bay street; lots 76 & 80 on West Erie street; lot 64 on West Huron street; lots 8, 16, & 26 on West Ontario street; lot 50 on West St. Clair street; lots 5 & 24 on West St. Croix street; an undivided half of lots 262, 264, 266, 268, 269, and 267, and lots 270, 271, 272, 273, 274, 275, 276, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 299, 301, 313. 314, 315, & 316 on River street; lot 3 on Chicago pier; lot 22 on Dunkirk pier; lots 6 & 17 on Hamilton pier; lot 29 on Oswego pier; blocks 30, 32, & 58 on East 1st street; E. ½ of block 41 on East 2nd street; an undivided one-half of W. ½ of block 44 and lots 212 and 563 on East 2nd street; an undivided one-fourth of block 6 on East 21st street; block 94 on Amazon street; block 112 on Azof street; block 47 on Baltic street; blocks 65, 67, and lots 13, 25, 28, 29, 30, 31, 32, 33, 34, 35, & 36 on East Bay street; block 85 on Boden street; lots 33 and 35 on East Huron street; blocks 13, 14, 15, 16, 18, 26, 27, 28, 31, 32, 19, 21, and 69 on East Itasca street; lots 26, 29, 31, 32, 33, 35, and 36 on East Michigan street; W. ½ of block 124 on Pennsylvania avenue; block 105 on Pepin street; block 112 on Ponchartrain street; lot 64 on East St. Clair street; lots 13, 14, 15, 16, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, & 36 on East St. Croix street; block 48 on St. George street; block 75 on Winne-
38 bago street; S. E. ¼ of block 30 on West 19th street; all the foregoing lots and blocks lying and being in the town site of

Superior, according to the plat thereof of record in the register of deeds' office in said Douglas county.

And in Ely's addition to Superior the following:

Fr. lots 470 & 524 on 3rd street; lots 533, 444, 452, 454, 458 on 4th street; lots 472, 493, 441, 445, 447, 544, 564, on 5th street; lots 493, 495, 578, 390, 392, 518, 520, 522, 524, 544, 571, & 580 on 6th street; lots 376, 378, 380, 381, 382, 482, 384, 578, 577, 584, & 582 on 7th street; lots 386, 388, 436, 460, 462, 464, 474 ,476, 478, 480, 484, 482, 486, 488, 544, 600, 604, 607 on 8th street; lots 397, 399, 494, 510, 587, 512, 405, & 407, 408, & 460 on 9th street; lots 551, 454, 563, 569, 513, 554 on 10th street; lots 433, 439, 458 on 11th street; lot 498 on 12th street, and fr. — 453 on 12th street, and fr. lot 491 on 13th street.

And in the town site of Superior the following:

Lot 3, in block 55; lot 1, on block 77, and lot 1, in block 84; all described according to the plat of Superior City of record in the office of said register of deeds for Douglas county.

And the following lands:

S. ½ of N. W. ¼ sec. 4, town. 47, range 12 W.
N. ½ of S. W. ¼ " 17, " 47, " 13 "
An und. 30 acres in S. ½ N. W. ¼ sec. 17, T. 47, range 13 W.
And the following in town. 47, range 13 west:
E. ½ of N. W. ¼ and N. W. ¼ of N. E. ¼ of section 30.
E. ½ of N. E. ¼ and S. W. ¼ of N. E. ¼ of section 30.
E. ½ of the S. E. ¼ and N. W. ¼ of S. E. ¼ of sec. 30.
And the following in town. 47, range 14 west:
N. W. ¼ of section 2.
An und. ⅜ of N. E. ¼ of section 15.
An und. $\frac{7}{16}$ of S. W. ¼ of section 15.
N. ½ of S. E. ¼ and S. E. ¼ of S. E. ¼ of section 24.
39 The following in town. 48, range 11 west:
W. ½ of the S. W. ¼ of section 36.
The following in town. 48, range 12 west:
An und. ⅔ of west one-half of N. W. ¼ of section 7.
N. W. ¼ of S. W. ¼ and W. ½ of N. E. ¼ of S. W. ¼ of sec. 7.
The following in town. 48, range 11 west:
S. W. ¼ of N. W. ¼ of sec. 36.
The following in town. 48, range 13 west:
An und. ½ of S. E. ¼ of section 35;
N. W. ¼ of section 36;
N. W. ¼ of section 1;
And S. E. ¼ of sec. 17, town. 48, range 14 west.

And this defendant has no interest, right, or title in and to any other of the lands described in said bill of complaint, all of which said matters the said defendant does aver to be true, and pleads the same in abatement of so much of complainant's said bill as herein last above mentioned, and prays the judgment of this court whether he shall be compelled to further answer.

And the said defendant, J. F. Ellis, makes oath that the foregoing plea is true and is not interposed for delay.

J. F. ELLIS.

Subscribed and sworn to before me this 27th day of January, A. D. 1890.

CHARLES W. FISKE,
Notary Public, Wisconsin.

I, W. F. Bailey, of counsel for the said defendant in the above cause, do certify that the foregoing plea to the bill of complaint is, in my opinion, well grounded in law.

W. F. BAILEY,
Solicitor for Defendant."

40 And thereupon the defendant D. E. Roberts, on the 30th day of January, A. D. 1890, made and filed in this court his demurrer and plea in the words and figures following, to wit:

"In the United States Circuit Court in and for the Western District of Wisconsin.

THE NORTHERN PACIFIC RAILROAD COMPANY, Complainant,
vs.
DAVID E. ROBERTS, J. F. ELLIS, and EUCLID L. JOHNSON, Defendants.

Demurrer and Plea of Defendant D. E. Roberts.

This defendant says that he is advised that there is good cause for demurrer to said bill, and he demurs accordingly and for cause of demurrer says:

First. That said bill contains no matter of equity whereon this court can ground any decree or give complainant any relief as against this defendant.

Second. That it appears by said bill that the same is exhibited by the complainant against this defendant and J. F. Ellis and Euclid L. Johnson as defendants thereto for several distinct matters and causes, in many whereof, as appears by said bill, this defendant is in no way interested, and by reason of such distinct matters the said bill is drawn out to a considerable length, and this defendant is compelled to be put at charges in respect thereof, and by joining distinct matters together which do not depend upon each other the proceedings in the progress of the said suit will be intricate and prolix and this defendant put to unnecessary charges and
41 expenses in matters which in no way relate to or concern him.

Wherefore this defendant demurs thereto and craves judgment of the court whether he shall make answer to the said bill otherwise than as aforesaid, and he prays to be hence dismissed with his costs and charges in this behalf most properly sustained.

W. F. BAILEY,
Solicitor for Def't D. E. Roberts.

STATE OF WISCONSIN, } ss:
Douglas County, }

Defendant D. E. Roberts makes oath that the foregoing demurrer is not interposed for delay of the cause in which it is filed.

D. E. ROBERTS.

Subscribed and sworn to before me this 28 day of January, A. D. 1890.

HENRY S. BUTLER,
Notary Public, Wis.

I hereby certify, as counsel for the defendant D. E. Roberts in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper to be filed.

W. F. BAILEY,
Solicitor for Def't D. E. Roberts.

This defendant, not confessing all or any of the matters in said bill of complaint to be true as therein alleged, for plea to so much of said bill as alleges or pretends to state a cause of action against this defendant avers and says:

First. That none of the lots or tracts of land mentioned and described in the said bill of complaint, the title to which is in defendant D. E. Roberts, were at the time of the commencement of this action or at any time prior or subsequent to such time occupied by or in the possession of the complainant, or any part
42 or portion thereof.

And the said defendant further shows to your honors that of the said lands mentioned and described in said bill of complaint the title to the following only remains in the defendant D. E. Roberts:

In Douglas county, Wisconsin.

Lot 336, on 7th street, all in Ely's addition to Superior.

N. W. ¼ of block 15, on West 41st street; N. E. ¼ of block 29, on West 21st street; west one-half of block 26, on West 23rd street; lots 435 and 487, on West Bay street; lot 192, on West 7th street; lots 277 and 317, on River street; blocks 13, 25, 27, 28, 29, 30, 31, 32, 33, 35, 36, 41, 65, and N. E. ¼ of block 67, on East Bay street; S. ½ of N. ½ of block 12, on East 21st street; S. ½ of block 12, on East 23rd street; blocks 31, 32, 35, 34, & 71, on East Huron street; blocks 23, 34, E. ½ 35, and E. ½ 36, in East Itasca street; blocks 29, 31, 32, 33, 34, 35, 36, on East Michigan street; block 64, on East St. Clair street; blocks 13, 14, 15, 16, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, & 36, on East St. Croix street, all in the town site of Superior City, Douglas county, Wisconsin.

And S. ½ of N. W. ¼ of sec. 17, town. 47, range 13 west, in Douglas county, Wis.

And this defendant has no interest, right, or title in and to any other of the lands described in said bill of complaint, all of which said matters the said defendant does aver to be true, and pleads the

same in abatement of so much of complainant's said bill as herein last above mentioned, and prays the judgment of this court whether he shall be compelled to further answer.

And the said defendant D. E. Roberts makes oath that the foregoing plea is true and is not interposed for delay.

43 D. E. ROBERTS.

Subscribed and sworn to before me this 28 day of January, A. D. 1890.

HENRY S. BUTLER,
Notary Public, Wisconsin.

I, W. F. Bailey, of counsel for the said defendant in the above cause, do certify that the foregoing plea to the bill of complaint is, in my opinion, well grounded in law.

W. F. BAILEY,
Solicitor for Defendant."

And thereupon the defendant Euclid L. Johnson on the 3rd day of February, A. D. 1890, made and filed in this court his certain other appearance in the words and figures following, to wit:

"In United States Circuit Court in and for the Western District of Wis.

THE NORTHERN PACIFIC R. R. COMPANY, Complainant,
vs.
DAVID E. ROBERTS, J. F. ELLIS, and EUCLID L. JOHNSON, Defendants.

The said defendant, Euclid L. Johnson, hereby appears for himself in the above-entitled cause and, submitting to the jurisdiction of the court therein over him in said cause, asks leave to file at the next rule-day his demurrer, plea, or answer to the bill of complaint as he may be further advised.

EUCLID L. JOHNSON,
For Himself in Person, Def't.

P. O. address, Superior, Douglas Co., Wis."

44 Thereupon and on the 3rd day of March, A. D. 1890, the said court made an order setting down the said demurrers and pleas in the words and figures following, to wit:

Circuit Court of the United States for the Western District of Wisconsin.

THE NORTHERN PACIFIC RAILROAD COMPANY
vs.
J. F. ELLIS, D. E. ROBERTS, and E. L. JOHNSON.

Ordered that the demurrers and pleas of the defendants Ellis and Roberts be set down for argument to be heard on the 20th day of March, A. D. 1890, at ten o'clock in the forenoon.

And thereupon and on the 12th day of April, A. D. 1890, the said court made an order overruling the said demurrers and pleas in the words and figures following, to wit:

Circuit Court of the United States for the Western District of Wisconsin.

THE NORTHERN PACIFIC RAILROAD COMPANY
vs.
J. F. ELLIS, D. E. ROBERTS, and EUCLID L. JOHNSON.

The demurrers and pleas of the defendants Ellis and Roberts came on to be heard on the 20th day of March, A. D. 1890, by counsel, whereupon it was ordered by the court that the said demurrers and pleas be, and the same are hereby, overruled, and that the defendants have twenty days in which to file their answer to the bill of complaint of the complainant.

45

And thereupon and on the 20th day of May, A. D. 1890, the said defendants, J. F. Ellis and D. E. Roberts, filed their answer to said bill in the words and figures following, to wit:

In Circuit Court United States, Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY, Complainant,
vs.
D. E. ROBERTS and J. F. ELLIS.

Answer.

The defendants, D. E. Roberts and J. F. Ellis, saving and reserving to themselves all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said bill of complaint contained, for answer thereunto or unto so much thereof as these defendants are advised is material to answer do say that—

They each admit that the county board of Douglas county adopted the resolutions set forth in complainant's said bill relating to the transfer by sufficient deeds of conveyance to the complainant herein all the alienable lands or lots belonging to said county of Douglas which had been acquired by deed, to which said county had held undisputed title during two years then last past, and that in pursuance of said resolutions the county clerk of said county did make and execute the deed of conveyance to said lots and lands to the complainant, which, among others, embraced the lands described in the bill of complaint herein, but avers that such conveyance to said company was wholly without consideration; that said lots and lands were donated by said county board to said complainant as aid to said railroad company in building and constructing its road in that portion of Douglas county and upon the line as designated in said resolution; that no stock of said railroad company or bonds or other consideration whatever was

46

given or offered or intended to be given or offered to said county for or in lieu of such conveyances, nor were said resolutions or any of them or such conveyance authorized or directed or ratified by a vote of the people of said county, nor were they ever submitted to a vote of the people for authority, approval, direction, or ratification, but, on the contrary, such acts and agreements on the part of the county board were arbitrary on their part and wholly unauthorized and void.

That all of said lots and lands so pretended to be conveyed were the property of the county and to which the county held the title in fee, and the said board of supervisors had no power or authority to convey or order to be conveyed any of said lots or lands, only upon receiving an adequate consideration in money therefore; that thereafter and on or about the 6th day of July, 1888, the board of supervisors, believing and being advised that the action of their predecessors in giving away the said lots and lands, the property of said county, was unauthorized and void, for a good and sufficient consideration, sold and had conveyed the title to said lots and lands to the defendant D. E. Roberts, who conveyed a portion of them, as hereinafter stated, to the defendant J. F. Ellis and still another portion to one Johnson and different tracts of the same lots and lands to other parties; that thereafter and on or about the 1st day of September, 1889, the said defendant, Ellis, being in possession of a portion of said lots, brought his certain action in the circuit court of said Douglas county against the said complainant to quiet
47 his title thereto, which said action is now pending and undetermined in the supreme court of the State of Wisconsin and involves the same and every question that is involved in this action, and especially the validity of the conveyance to the complainant by the county as well as the validity of the conveyance to and the title of the defendants herein to said lands, and this action is brought especially to avoid and evade the judgment and determination of the State courts in respect to said question and said title.

That none of the lots or tracts of land mentioned and described in said bill of complaint were at the time of the commencement of this action or at any time prior or subsequent thereto occupied by or in the possession of the complainant, except that the road-bed of its said railroad crosses the following-described tracts—that is to say, lots 217, 339, 371, 469, and 473, on West First street; lots 14, 28, 30, 32, and 42, on West Itasca street; blocks 13, 15, 19, 21, 23, 27, 29, 31, 33, and 69, on East Itasca street; lots 26, 28, and 37, on River street, and lots 2, 3, and 4, on Detroit pier.

That the remaining part of said tracts so crossed by said road, as well as the whole of the other tracts of land mentioned and described in complainant's said bill, are vacant and unoccupied and have so remained for more than ten years last past; that the several tracts designated as lots and blocks are useful only and solely designed for buildings, while the balance are farming lands, not contiguous or necessarily or for convenience to be used in common with each other.

And the defendants further show to your honors and deny that the complainant constructed its road in Douglas county in pursuance of or in reliance upon its pretended contract with the board of supervisors of Douglas county, as set forth in said bill, or that it expended any sum of money whatever upon the faith of or
48 in pursuance of such agreement, and avers the facts to be that the said complainant had resolved to construct its said road from the Northern Pacific railroad junction in Carroll county, Minn., to Ashland, in Ashland county, Wisconsin, which necessarily would pass through the county of Douglas and in close proximity to the platted portion of the village of Superior. Through its agents it conceived the plan of exacting aid from said county and citizens thereof, and formulated the proposition and resolution set forth in said bill. In addition to the aid exacted from the county board of supervisors it exacted and received from residents of said county and owners of real estate therein aid and donations of property in value in excess of the cost of constructing said road upon the line and route upon which it was constructed and as stated in said bill of complaint.

And the defendants further show to your honors and deny that the said tracts of land had no market value at the time of the making of the proposition by the board of supervisors, as set forth in said bill, and that the county was unable to sell the same for the amount of the tax liens thereon, but avers the fact to be that said lands and lots were of considerable value in excess of the amount of the tax liens thereon, and could readily have been sold for more than such liens.

And the defendants further show to your honors and deny that by reason of the construction and operation of complainant's said road into Douglas county the said real estate, together with all other real estate, has greatly appreciated in value, but aver the fact to be that the construction of said road had but very little effect in increasing the value of property in said county; that the great increase in values in the city of Superior, in said county, which
49 is the only place where there has been any perceptible increase in value, is owing to its location at the head of Lake Superior, the construction of the Omaha road, and the investment of capitalists of large amounts of money in manufacturing, storage, and other enterprises in said city.

And the defendants further show to your honors and deny that chapter 150 of the laws of Wisconsin for the year 1883 approved and ratified the act of the board of supervisors of Douglas county in contracting said lands with the complainant and in conveying said lands to the complainant, and deny that such act of 1883 or the acts of the board of supervisors or of the county clerk in making the said deed or any and all of said acts and proceedings did or could under the laws and constitution of the State of Wisconsin have the effect to convey said lands or vest the title thereto in the complainant.

And the defendants further show to your honors and deny that the said defendants or either of them combined or confederated

with any person whatsoever in purchasing said lands, or that they contrived or attempted or designed in any manner to injure the complainant or cloud its title to said lands or to involve the same or their title or pretended title in litigation, but aver the fact to be that the said defendant, Roberts, purchased said lands from said county in good faith and for the consideration named, which was the actual value of the title to said lands, the value of such title having been greatly impaired and rendered almost valueless by the cloud upon the same created by said resolutions of the county board and such conveyance by the county clerk and such legislative act.

And the defendants further show to your honors and deny that the certificates of sale that were subsequent to the conveyance by the county to the complainant, assigned to the defendant Roberts, were wrongfully or fraudulently obtained by him, or that
50 the complainant had any right or title thereto whatever, and aver that the same were in good faith and for a valuable and sufficient consideration purchased by and assigned to said defendant, Roberts, and that he obtained full right and title thereto.

And the defendants further show to your honors and deny that the complainant has any right, title, or interest in and to said lands or any of them, and aver the fact to be that the title thereto is in the defendants Roberts and Ellis; that of the said lands mentioned and described in said bill of complaint the title to the following only remains in the defendant D. E. Roberts:

In Douglas county, Wisconsin.

Lots 472, 493, on Fifth street; lot 336, on Seventh street, all in Ely's addition to Superior; N. W. ¼ of block fifteen (15), on West 41st street; N. E. ¼ of block twenty-nine, on West 21st street; W. ½ of block twenty-six, on West 23rd street; lots 435 and 487, on West Bay street; lot 192, on West Seventh street; lots 277 and 317, on River street; blocks thirteen, twenty-five, twenty-seven, twenty-eight, 29, 30, 31, 33, 35, 36, 41, 65, and N. E. ¼ of block 67, on East Bay street; S. ½ of N. ½ of block 12, on East 21st street; S. ½ of block 12, on East 23rd street, blocks 31, 32, 35, 34, and 71, on East Huron street; block- 23, 33, 34, on East Itasca street; block- 29, 31, 32, 33, 34, 35, 36, on East Michigan street; block 64, on East St. Clair street; blocks 13, 14, 15, 16, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, on East St. Croix street, all in the town site of Superior City, Douglas county, Wisconsin, and S. ½ of N. W. ¼ of section 17, town. 47, range 13 west; N. W. ¼ of section 2, in town. 47, range 14 west, in Douglas Co., Wis.

The following only were conveyed to defendant Ellis by def't Roberts—that is to say:

In Douglas county, Wisconsin.

51 Town lot 217, on West 1st street; lot 399, on West 3rd street; lots 8 and 355, on West 4th street; lot 68, on West 5th street; lots 70, 75, and 256, on West 6th street; lots 72 and 192, on West 7th street; lots 38, 40, 110, and 276, on West 8th street;

lots 3, 5, 33, 35, 37, 168, 170, and 172, on West 9th street; lot 487, on West Bay St.; lots 76 and 80, on West Erie street; lot 64, on West Huron street; lots 8, 16, and 26, on West Ontario Str.; lot 50, on West St. Clair street; lots 5 and 24, on West St. Croix street; an undivided half of lots 262, 264, 266, 268, 269, 267, and lots 270, 271, 272, 273, 274, 275, 276, 278 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 299, 301, 313, 314, 315, 316, on River street; lot 3, on Chicago pier; lot 22, on Dunkirk pier; lots 6 & 17, on Hamilton pier; lot 29, on Oswego pier; blocks 30, 32, and 58, on East 1st street; east quarter of block 41, on East 2nd street; an undivided one-half of west half of block 44 and lots 212 and 563, on East 2nd street; an undivided one-fourth of lot 6, on East 21st street; block 94, on Amazon Str.; block 112, on Azof street; block 47, on Baltic street; block 65 and 67 and lots 13, 25, 28, 29, 30, 31, 32, 33, 34, 35, and 36, on East Bay street; block 85, on Boden street; lots 33 and 35, on East Huron street; blocks 13, 14, 15, 16, 18, 26, 27, 28, 31, 32, 19, 21, and 69, on East Itasca street; lots 26 & 29 and 31, 32, 33, 35, and 36, on East Michigan street; west half of block 124, on Peninsula avenue; block 105, on Pepin street; block 112, on Ponchartrain street; lot 64, on East St. Clair street; lots 3, 13, 14, 15, 16, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, and 36, on East St. Croix street; block 48, on St. George street; block 75, on Winnebago street; S. E. ¼ of block 30, on West 19th street; all the foregoing lots and blocks lying and being in the town site of Superior, according to the plat thereof of record in the register of deeds' office in said Douglas county.

And in Ely's addition to Superior the following:

52 Fractional lots 470 and 524, on 3rd street; lots 533, 444, 452, 454, 458, on 4th street; lots 472, 493, 441, 445, 447, 544, 564, on 5th street; lots 493, 495, 578, 390, 392, 518, 520, 522, 524, 544, 571, and 580, on 6th street; lots 376, 378, 380, 381, 382, 482, 384, 578, 577, 584, and 582, on 7th street; lots 386, 388, 436, 460, 462, 464, 474, 476, 478, 480, 484, 482, 486, 488, 544, 600, 604, 607, on 8th street; lots 397, 399, 494, 510, 587, 512, 405, and 407, 408, and 416, on 9th street; lots 551, 454, 563, 569, 513, 554, on 10th street; lots 433, 439, 458, on 11th street; lot 498, on 12th street, and fr. 453, on 12th street, and fr. lot 491, on 13th street.

And in the town site of Superior the following:

Lot 3, in block 55; lot 1, on block 77, and lot 1, in block 84; all described according to the plot of Superior City, of record in the office of said register of deeds of Douglas county.

And the following lands:

S. ½ of N. W. ¼ of sec. 4, town. 47, range 12 west.

N. ½ of S. W. ¼ of sec. 17, town. 47, range 13 west.

An und. 30 acres in S. ½ N. W. ¼, sec. 17, T. 47, R. 13 west.

And the following in town. 47, range 13 west:

E. ½ of N. W. ¼ and N. W. ¼ of N. E. ¼ of sec. 30, E. ½ of N. E. ¼ and S. W. ¼ of N. E. ¼ of sec. 30, E. ½ of S. E. ¼ and N. W. ¼ of E. ¼ of sec. 30.

And the following in town. 47, range 14 west:

N. W. ¼ of sec. 2, an und. ⅜ of N. E. ¼ of sec. 15, an undivided

$\frac{7}{16}$ of S. W. $\frac{1}{4}$ of sec. 15, N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of sec. 24.

The following in town. 48, range 11 west:

W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of sec. 36.

The following in town. 48, range 12 west:

53 An undivided $\frac{2}{3}$ of W. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of sec. 7; N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ and west $\frac{1}{2}$ of N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of sec. 7.

The following in town. 48, range 11 west:

S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of sec. 36.

The following in town. 48, range 13 west:

An und. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of sec. 35, N. W. $\frac{1}{4}$ of sec. 36, N. W. $\frac{1}{4}$ of sec. 1, and S. E. $\frac{1}{4}$ of sec. 17, town. 48, range 14 west.

And the defendants further show to your honors that they are ready and willing and hereby offer to pay to the complainant such sums of money as the complainant has paid out for taxes on said lands since the conveyance by Douglas county to it of the same as a condition of relief to the defendants herein if the court shall adjudge the title to be in the defendants, and that in equity such sums should be so paid to the complainant.

Wherefore the defendants pray that the court decree that the complainant take nothing by the said bill, and that the same be dismissed with costs, and that it further decree that the defendants hold the title to said lands free and clear of any claim, demand, title, or interest claimed therein by the complainant by virtue of the resolution of the county board of Douglas county and the conveyance by said county to it of said lands, and for such other or further relief in the premises as may be proper and agreeable to equity.

And having thus fully made answer to said bill, these defendants pray to be hence dismissed with costs.

J. F. ELLIS.

UNITED STATES OF AMERICA, }
District of Wisconsin. }

We, J. F. Ellis and D. E. Roberts, defendants in above cause,
54 having read the foregoing answer and being each duly sworn, do say that the matters and things in said answer contained are true.

J. F. ELLIS.

Subscribed and sworn to before me this 19th day of May, A. D. 1890.

CHAS. W. FISKE,
[SEAL.] *Notary Public, Eau Claire Co., Wis.*

W. F. BAILEY,
Counsel for Defendant-.

And thereafter and on the 11th day of November, A. D. 1890, the said court made an order setting down for hearing this cause upon said bill and answer in the words and figures following, to wit:

Circuit Court of the United States for the Western District of Wisconsin.

THE NORTHERN PACIFIC RAILROAD COMPANY
vs.
J. F. ELLIS, D. E. ROBERTS, and EUCLID JOHNSON.

Ordered that the cause be set down for hearing upon the bill of complaint and answer of the defendants Ellis and Roberts, to be heard on the 18th day of November, A. D. 1890, at ten o'clock in the forenoon.

And thereafter and on the 11th day of February, A. D. 1891, the court made an order in the words and figures following, to wit:

55 Circuit Court of the United States for the Western District of Wisconsin.

THE NORTHERN PACIFIC RAILROAD COMPANY
vs.
J. F. ELLIS, D. E. ROBERTS, and E. L. JOHNSON.

This cause having been argued by the counsel for the respective parties, it is thereupon ordered that a final decree be entered in favor of the complainant, according to the prayer of the bill, with costs.

Whereupon the following decree was afterwards drawn up and entered for the complainant, dated and signed the 7th day of March, A. D. 1891:

56 Circuit Court of the United States for the Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY, Complainant,
vs.
DAVID E. ROBERTS, J. F. ELLIS, and EUCLID L. JOHNSON, Defendants.

At December Stated Term, A. D. 1890.

This cause came on to be heard at this term upon the bill and answer of the defendants David E. Roberts and J. F. Ellis filed herein May 20, A. D. 1890, and was argued by counsel; and the said complainant having elected to dismiss its said bill of complaint as to the defendant Euclid L. Johnson, thereupon, on consideration thereof, it was ordered, adjudged, and decreed as follows, namely: That the said complainant is the full, legal, and beneficial owner of the tracts of land described in the bill of complaint in this cause, namely:

Lot 217, on West First street.
Lot 399, on West Third street.
Lot 455, on West Fourth street.
Lot 68 on West Fifth street.
Lots 192, 205, 207, on West Seventh street.

Lots 38, 40, 110, 276, on West Eighth street.
Lots 3, 5, 33, 35, 37, 132, 134, 168, 170, 172, on West Ninth street.
The southeast quarter of block 30, on West Nineteenth street.
The west half of block 26, on West Twenty-third street.
The northwest quarter of block 15, on West Forty-first street.
Blocks 30 and 32, on East First street.
Lots 212, 563, the east quarter of block 41, and the undivided half of the west quarter of block 44, on East Second street.
The undivided quarter of block 6, on East Twenty-first street.
Lot 42, on West Itasca street.
The south half of block 12, on East Twenty-third street.
57 Lot 5, on West St. Croix street.
Lot 487, on West Bay street.
Lot 59, on West Michigan street.
Lot 64, on West Huron street.
Lot 50, on West St. Clair street.
Lots 76 and 80, on West Erie street.
Lots 8, 16, and 26, on West Ontario street.
Blocks 13, 14, 15, 16, 18, 19, 21, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 69, on East Itasca street.
Blocks 13, 14, 15, 16, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, on East St. Croix street.
Blocks 13, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 41, 65, and the northeast quarter of block 67, on East Bay street.
Lot 26, blocks 29, 31, 33, 34, 35, 36, on East Michigan street.
Block 31, on East Huron street.
Block 75, on Winnebago street.
Block 47, on Baltic street.
Block 112, on Azof street.
Block 105, on Pepin street.
Block 85, on Boden street.
Block 94, on Amazon street.
Block 112, on Ponchartrain street.
Block 48, on St. George street.
The undivided half of lot 262, the undivided half of lot 264, the undivided half of lot 266, the undivided half of lot 267, the undivided half of lot 268, the undivided half of lot 269, and lots 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 299, 301, 313, 314, 315, 316, and 317, on River street.
58 Lot 29, on Oswego pier.
Lot 3, on Chicago pier.
Lot 7, on Quebec pier.
Lot 6, on Hamilton pier.
Lot 22, on Dunkirk pier; all in the town site of Superior (now the city of Superior), according to the plat of said town site recorded in the office of the register of deeds in and for the said county of Douglas.

Ely's addition.

Lots 570 and 524, fractional, on Third street.
Lots 444 and 533, on Fourth street.
Lots 441, 472, 493, and 544, on Fifth street.
Lots 493, 495, 544, 571, 578, and 580, on Sixth street.
Lots 381, 482, 577, on Seventh street.
Lots 386, 388, 436, 460, 462, 464, 474, 476, 478, 480, 482, 484, 486, 488, 544, 600, 604, and 607, on Eighth street.
Lots 397, 399, 405, 407, 408, 494, 510, 512, and 587, on Ninth street.
Lots 454, 513, 551, 554, 563, and 569, on Tenth street.
Lots 433, 439, and 458, on Eleventh street.
Lots 453 and 498, on Twelfth street.
Lots 487, 489, and 491, on Thirteenth street, in Ely's addition to Superior (now the city of Superior), according to the plat of said Ely's addition recorded in the office of the register of deeds in and for the said county of Douglas.

Also the southeast quarter of section 17, in township 48, range 14 west; the undivided half of the southeast quarter of section 35 and the northwest quarter of section 36, in township 48, range 13 west; the west half of the northeast quarter of the southwest quarter and the undivided two-thirds of the west half of the
59 northwest quarter of section 7, in township 48, range 12 west.

The west half of the southwest quarter and the southwest quarter of the northwest quarter of section 36, in township 48, range 11 west.

The northwest quarter of section 2 and the north half of the southeast quarter and the southeast quarter of the southeast quarter of section 24, in township 47, range 14 west; the north half of the southwest quarter and an undivided thirty acres in the south half of the northwest quarter of section 17, and the northwest quarter of the northeast quarter, the east half of the northeast quarter, the southwest quarter of the northeast quarter, the east half of the southeast quarter, the northwest quarter of the southeast quarter, and the east half of the northwest quarter of section 30, in township 47, range 13 west.

And the south half of the northwest quarter of section 4, in township 47, range 12 west.

All of said tracts of land being situated in the county of Douglas, State of Wisconsin.

And that the deeds of conveyance of said premises executed and delivered by said Douglas county to said defendant Roberts, one dated July 6, 1888, and recorded in the office of the aforesaid register of deeds in Book 3 of Tax Deeds, on pages 345 *et seq.*, and one other dated the 7th day of March, A. D. 1889, and recorded in the office of the aforesaid register of deeds in Book S of Deeds, on page 699, and also that certain tax deed executed by the said county of Douglas, State of Wisconsin, to said defendant Roberts, dated July 12, 1888, and recorded in the office of the aforesaid register of deeds in Book 3 of Tax Deeds, on page 443, and also that certain deed

executed by said defendant Roberts to said defendant Ellis, dated on the 8th day of April, 1889, and recorded in the office of
60 the aforesaid register of deeds in Book 9 of Deeds, on page 216, and all claim or title of the said defendants David E. Roberts and J. F. Ellis in and to the said lands under or by virtue thereof or otherwise are invalid and of no force or effect whatever as against the said complainant and its said title to said lands, and that said deeds of conveyance be, and the same are hereby, vacated, cancelled and annulled; that the proposition made by the board of supervisors of the county of Douglas to the said complainant and its acceptance by said complainant, as described and set forth in said bill of complaint, constituted a legal and valid contract between the parties thereto and authorized and empowered the said board of supervisors of said county of Douglas to grant and convey to the said complainant the aforesaid lands and premises in manner and form as stated in said bill of complaint.

It is further ordered, adjudged, and decreed that the said defendant David E. Roberts and all persons claiming under, by, or through him and his and their attorneys, solicitors, and agents be, and the same hereby are, perpetually enjoined and restrained from setting up, asserting, or attempting to put in force or use any claim to any right, title, or interest in or to said lands and premises or any part thereof under and by virtue of the said deeds executed to him by said Douglas county, one dated July 6, 1888, and recorded in the office of the aforesaid register of deeds in Book 3 of Deeds, on pages 345 *et seq.*, and one other dated March 7, A. D. 1889, and recorded in the office of the aforesaid register of deeds in Book 8 of Deeds, on page 699, and also that certain tax deed executed by the said county of Douglas, State of Wisconsin, to said defendant Roberts, dated July 12, 1888, and recorded in the office of the aforesaid
61 register of deeds in Book 3 of Tax Deeds, on page 433.

And it is further ordered, adjudged, and decreed that the said J. F. Ellis and all persons claiming under, by, or through him and his and their attorneys, solicitors, and agents be, and the same are hereby, perpetually enjoined and restrained from setting up, asserting, or attempting to put in force or use any claim of any right, title, or interest in or to the said lands or premises or any part thereof under or by virtue of said deeds last above mentioned or under and by virtue of a certain deed of conveyance executed by the defendant David E. Roberts to him, said Ellis, dated on the 8th day of April, 1889, and recorded in the office of the aforesaid register of deeds in Book 9 of Deeds, on page 216.

It is further ordered, adjudged, and decreed that the bill of complaint herein be, and the same is hereby, dismissed, without costs and without prejudice, as to the defendant Euclid L. Johnson, and that the defendants David E. Roberts and J. F. Ellis pay to the said complainant, The Northern Pacific Railroad Company, and that the said complainant do have and recover of and against them its proper costs and charges in this suit in this behalf expended, to be taxed by the clerk of this court and entered upon the foot of this

decree, and that execution be awarded therefor in favor of the said complainant and against said defendants according to law.

And thereupon, the said defendants praying an appeal, the same is hereby allowed upon defendants filing a bond, with sureties, in the sum of one thousand dollars, conditioned according to law and to be approved by a judge of this court.

Dated March 7, 1891.

By the court:

R. BUNN, *Judge.*

The costs of the plaintiff, The Northern Pacific Railroad Co., taxed and allowed at eighty-nine dollars and forty-four cents, and entered hereon this 7th day of March, 1891.

F. M. STEWART, *Clerk.*

Costs $89.44.

62 In the Supreme Court of the United States.

THE NORTHERN PACIFIC RAILROAD COMPANY, Complainant,
vs.
D. E. ROBERTS & J. F. ELLIS, Defendants.

Know all men by these presents that we, D. E. Roberts and J. F. Ellis, as principals, and M. J. Argard and Peter Hanson, as sureties, all residing in the State of Wisconsin, are held and firmly bound unto the Northern Pacific Railroad Company, a corporation, etc., and its successors and assigns in the sum of one thousand dollars ($1,000), to be paid to the said Northern Pacific Railroad Company, its successors and assigns; for which payment well, and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 17th day of March, 1891.

Whereas the above-bounden D. E. Roberts and J. F. Ellis have prosecuted an appeal in the Supreme Court of the United States to reverse the decree rendered in the above-entitled cause by the circuit court of the western district of Wisconsin:

Now, therefore, the condition of this obligation is such that if the above-named D. E. Roberts and J. F. Ellis shall prosecute their appeal to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

D. E. ROBERTS. [SEAL.]
J. F. ELLIS. [SEAL.]
M. J. ARGARD. [SEAL.]
PETER HANSON. [SEAL.]

Signed, sealed, and delivered in presence of—
THEO. B. SMITH.
ROB'T D. ESTES,
As to D. E. Roberts.
J. B. FLEMING,
W. F. BAILEY,
As to J. F. Ellis, M. J. Argard, and Peter Hanson.

63 UNITED STATES OF AMERICA, }
Western District of Wisconsin. }

M. J. Argard and Peter Hanson, being duly sworn, says, and does each for himself depose and say, that he is worth the sum of two thousand dollars ($2,000) over and above all his just debts and liabilities and property exempt from seizure and sale upon execution.

M. J. ARGARD.
PETER HANSON.

Subscribed and sworn to before me this — day of March, 1891.

MICHAEL GRIFFIN,
U. S. Court Commissioner for the Western District of Wisconsin.

I hereby approve the above bond and the sufficiency of the sureties thereto.

Approved in open court this 26th day of March, 1891.

R. BUNN,
Judge of the District Court of the United States for the Western District of Wisconsin.

64 UNITED STATES OF AMERICA, }
Western District of Wisconsin, } *ss:*

I, F. M. Stewart, clerk of the circuit court of the United States of America for the western district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with the originals now in my custody, and they are true copies of their respective originals and are correct transcripts therefrom and of the whole thereof now on file and remaining of record in my office, being transcript record on appeal to Supreme Court of United States in within-entitled cause.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Madison, in the said western district of Wisconsin, this 4th day of April, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the said United States the one hundred and fifteenth.

Seal U. S. Circuit Court, Western Dist. of Wisconsin.

F. M. STEWART, *Clerk.*

65 In Circuit Court United States for Western District of Wisconsin.

NORTHERN PACIFIC RAILROAD COMPANY }
vs. } No. 434.
J. F. ELLIS and D. E. ROBERTS. }

Supplemental Answer.

The supplemental answer of the above-named defendants to the bill of complaint of the above-named complainant.

In further answer to said bill than appears in the original answer heretofore filed herein and in addition thereto the said defendants say as follows:

That the supreme court of the State of Wisconsin on the 20th day of May, 1890, rendered judgment in the cause wherein J. F. Ellis was plaintiff and The Northern Pacific Railroad Company was defendant, which is the same action mentioned in the defendant's original answer herein as pending at the time said answer was filed; which said action was brought by said plaintiff therein to quiet title to and remove cloud created by the deed of the said defendant therein, The Northern Pacific Railroad Company, which is the same deed set forth in the complainant's bill in this cause, from a number of tracts of land included and described in said deed; which said tracts of land had been purchased from the defendant D. E. Roberts by said Ellis, as stated in the bill and the answer herein, and the supreme court of Wisconsin in and by such judgment determined and decided the validity and legal effect of the said deed from Douglas county to the Northern Pacific Rail-
66 road Company; also as to the power of the said county to grant the lands to said company at the time and in the manner and upon the terms and for the consideration as stated in the complainant's said bill in this cause, and also the legal effects of chapter 150 of the laws of Wisconsin for the year 1883 as aiding or confirming title to said lands in the complainant in this cause; all of which were questions necessarily involved in said action and as to which the complainant here, as defendant there, through its duly authorized attorneys, appeared in said court and invoked a decision thereof, and the said supreme court of Wisconsin so decided and determined said questions and each and every of them against the said Northern Pacific Railroad Company and did decide and determine that the said deed from the county of Douglas to the complainant herein, which is the deed referred to and set out at length in the complainant's bill herein, was void and conveyed to it no title; that the county of Douglas or its board of supervisors acting for it had no authority or power under the laws of Wisconsin to donate or grant the lands in said deed described or any of them to said railroad company upon the consideration expressed and alleged in said bill of complainant in this cause.

The judgment of said supreme court was rendered upon a demurrer to the sufficiency of the complaint therein and was the decision of the court upon such demurrer, and one of the questions involved and necessary to be determined was the validity of the deed from Douglas county to the Northern Pacific R. R. Co.; also the power of the county board of said county to donate the said lands; also the validity of chap. 150, laws 1883.

That chapter 150 of the laws of Wisconsin for the year 1883, which attempts to confirm the title of the Northern Pacific Railroad Company to said lands so described in said deed, was invalid and did not have the effect to so confirm said title in said railroad company.

And these defendants urge and plead such judgment of the said supreme court of the State of Wisconsin in bar of the right
67 of the complainant herein to again litigate or review in any manner in this court and in this action any of the points or

questions so decided by said court, and that as to the said complainant such questions have become and are by said judgment *res adjudicata*.

W. F. BAILEY,
Solicitor for Defendants.

STATE OF WISCONSIN, } ss:
Eau Claire County, }

J. F. Ellis and D. E. Roberts, each being separately sworn, do each for himself depose and say that they are the defendants in this action; so much of the foregoing answer as concerns my own acts and deeds is true, to the best of my knowledge, and so much thereof as concerns the acts or deeds of any other person or persons I believe to be true.

——— ———.
——— ———.

Sworn and subscribed before me this — day of November, 1890.

——— ———.

68 U. S. Supreme Court, October Term, 1893.

D. E. ROBERTS *et al.*, Appellants,
vs.
NORTHERN PACIFIC RAILROAD CO., Appellee. } No. 434.

It is hereby stipulated that the foregoing paper, which is the original proposed supplemental answer taken from the files of the U. S. circuit court for the western district of Wisconsin, may be filed in this cause and printed as a part of the record therein the same as if the same had been originally returned therewith.

Washington, D. C., May 22d, 1894.

WM. F. VILAS,
Counsel for App'ts.
A. H. GARLAND,
Att'y for Appellee.

[Endorsed:] U. S. circuit court, west dist. of Wis. N. P. R. R. Co. vs. D. E. Roberts *et al.* Supplemental answer not allowed. Filed Feb'y 11, 1891. F. M. Stewart, C.

[Endorsed:] Case No. 14,571. Supreme Court U. S., October term, 1893. Term No., 434. D. E. Roberts *et al.*, app'ts, vs. The Northern Pacific Railroad Company. Stipulation and addition to record. Filed May 24, 1894.

Endorsed on cover: Case No. 14,571. W. Wisconsin C. C. U. S. No. 124. D. E. Roberts and J. F. Ellis, appellants, vs. The Northern Pacific Railroad Company. Filed April 8, 1891.

Supreme Court of the United States.

D. E. ROBERTS AND J. F. ELLIS,

Appellants,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY.

BRIEF AND ARGUMENT FOR APPELLANTS.

A succinct summary of the facts in advance will assist to an easier understanding of the record.

The county of Douglas, in the state of Wisconsin, had, in the year 1880, become the tax-title owner, by reason of sales for taxes theretofore unpaid, of the lots and land which are the subject of this suit, as well as of a number of others embraced in the deeds hereinafter in question, all lying within tne town of Superior. There is no dispute about the county's title, although but a tax title, both sides deriving therefrom. On September 7th, 1880, the board of supervisors of Douglas county, with a view to assist the Northern Pacific railroad in constructing its track in the town of Superior and at the instigation of the railroad company, adopted a series of resolutions proffering to give "all the

alienable lands or lots belonging to said county of Douglas" which had been acquired by deed and to which the county had held undisputed title for the two years then last past, on condition that the company should, within a time limited, build and equip a railroad from the Northern Pacific Junction to the Bay of Superior at a certain designated point. The railroad company, by resolution of its board of directors, accepted the gift and complied with the condition by building and equipping its road according to the resolutions, (which the company formulated according to its own plan) although with some delays: and thereupon the county of Douglas by deed reciting the fact and executed by the county clerk, with the seal of the county affixed, assumed to quitclaim to the company "in consideration of the premises and the sum of one dollar in hand paid by said grantee" the several lots and parcels of land coming within the terms of description in the resolution of the board, amounting to a very large number. This deed, bearing date January 20th, 1882, is the only basis of the railroad company's claim of title.

Under the constitution and laws of the state of Wisconsin, as then long settled by judgments of its supreme court, the arrangement between the county and the company was absolutely void, and the deed, which fully disclosed the agreement and consideration upon which it proceeded, was void upon its face; the county had neither power to make the agreement nor the county clerk to make the deed based upon it. Afterwards, by an act passed in 1883, the legislature declared the action of the county board in making the contract and conveyance to the railroad company to be approved and ratified and the conveyance to be valid and effect-

ual to pass the title. This act was itself void under the constitution of the state of Wisconsin.

Proceeding upon the invalidity of this conveyance, the county board and one of these appellants, Mr. Roberts, subsequently negotiated a sale of the county's title in pursuance of law and under due statutory authority, and the county board, by proper deed of conveyance, conveyed to the appellant Roberts a large quantity of the lots and lands which had been so previously deeded to the railroad company; and in the succeeding month of August, Roberts conveyed a large part of the same to appellant Ellis. Upon this right, so acquired, Ellis brought a suit in the circuit court for Douglas county in the state of Wisconsin against the railroad company, and other parties who had claims as owners of the original title which had been extinguished by the tax deeds to the county, to quiet his title, establish it against the original owners and remove the cloud upon it springing from the prior deed by the county to the railroad company. The suit, however, extended but to seven out of the large number of lots and parcels of land described in the deed to the railroad company, and in the deeds from the county to Roberts and from Roberts to Ellis; presumably because that was sufficient to try the title and embracing a larger number would multiply the defendants who were original owners. In this case brought by Ellis, all the facts were fully and truly set forth in his complaint and the railroad company demurred upon the substantive ground that the facts did not constitute a cause of action. The circuit court decided against the company, which appealed to the supreme court on the 21st day of October, 1889.

Before argument upon that appeal, and upon the 12th

day of December, 1889, the railroad company filed this bill in the United States circuit court for the western district of Wisconsin as a counter suit in equity, to quiet its title, *omitting*, however, from its claim the *seven lots* which were embraced in the suit in the state court. But, *before the suit in the federal court was ready for final hearing*, the appeal of the railroad company in the case pending in the state court was heard and decided by the supreme court of the state, which determined that the agreement between the supervisors of Douglas county and the railroad company, and the quitclaim deed purporting to be executed by the county to the railroad company, were both void under the constitution of Wisconsin, and that the act of the legislature undertaking to confirm and validate the transaction was also unconstitutional and void, and affirmed the decision of the state circuit court. Subsequently, the railroad company obtained leave of the state circuit court to substitute an answer for its demurrer; but by the answer only re-asserted its title derived from the contract and conveyance of the county.

Afterwards, and before the final hearing in the state circuit court, this suit in the Federal circuit court came to a hearing and resulted in a decree in favor of the railroad company, from which this appeal was taken, and thereupon the railroad company undertook to plead this decree in bar of further proceedings in the state court. The contention was denied, judgment went against the railroad company, in the state circuit court, and upon appeal that judgment was affirmed by the supreme court upon the distinct and specific ground that it had already, on *the former appeal* of the defendant company, *fully adjudicated and settled the rights of the parties.*

A writ of error from this court was sued out by the railroad company to that judgment of the supreme court of the state, and the record transmitted here accordingly, but upon motion of the appellant Ellis, then defendant in error, this court dismissed the writ because no federal question was raised by the record.

This brief recapitulation exhibits the entire controversy; the prior suit and the prior adjudication by the state court of the superior title of the appellant Ellis to the lots in question; this subsequent countersuit of the railroad company appealing to the federal jurisdiction to thwart and countervail the state courts, to which it first submitted in experiment of its opinion; with the result of different judgments in the different jurisdictions upon the same deed.

There follows a statement of the record as it is exhibited.

STATEMENT OF RECORD.

THE BILL was filed December 12th, 1889, in the United States circuit court for the western district of Wisconsin, and began by averring the organization of the complainant railroad under the act of congress approved July 2d, 1864, with its principal office and place of business in the city of New York, and that the defendants were citizens of the state of Wisconsin.

Euclid L. Johnson was joined as a defendant upon the allegation of some claim in the land; but the complainant subsequently dismissed as to him, and no further attention need be given him.

(See record, folio 56.)

The bill also alleged the complainant's authority to construct a railroad, and to purchase, acquire and hold real estate in the state of Wisconsin; that having built its railroad and telegraph line as far east as the Northern Pacific Junction in the state of Minnesota, in anticipation of a meeting of its board of directors to consider the extension of its line thence eastwardly, the board of supervisors of Douglas county, Wisconsin, on the 7th day of September, 1880, duly passed and caused to be entered in the record of its proceedings, resolutions (set forth at length, Rec. fol. 3) reciting these facts, and that the prosperity of the county would be greatly influenced by the manner in which and the route upon which the road should be extended through the county; and thereupon resolving that in the opinion of the board a certain line described would be best and most profitable to develop the county and its resources; and that it was the duty and true policy of the board to promote the construction of the main line and connections therewith upon such route; that the board, "in behalf of the county of Douglas, in aid of or inducement to the construction of a railroad at an early day, in the manner and upon the route indicated," thereby offered to the Northern Pacific Railroad Company, upon condition that the company should, within 60 days, indicate to the board its acceptance of the proposal, and within the year 1881 should construct and complete such railroad from the Northern Pacific Junction along the line and to the point indicated, that the county would, upon demand of the company after such road should have been completed in the said year 1881, and not otherwise, transfer by sufficient deed or deeds, to the company, "all the alienable lands or lots belonging to said county

of Douglas which have been acquired by deed and to which said county has held undisputed title during two years last past;" and that in further aid and upon like conditions, and to enable all persons interested in the county of Douglas to offer liberal contributions in behalf of the road, the county would join in conveyance to the company by such interested persons of whatever land such persons might contribute in behalf of said road, so that such contribution might be made without lien, and free from all incumbrance, "and would cooperate in the most liberal manner consistent with law with all persons desirous of aiding this enterprise, so important in the development of the county;" and further resolving that in case the railroad should cross the Nemadji river upon any county highway, near the point named, the county would, if the railroad company would adopt a bridge which would accomodate common road traffic, unite with the company in the construction of such bridge and assume a part of the cost of construction; and further resolving "that time is of the essence of this proposal, and that unless the same shall be accepted within 60 days, and thereafter unless said road shall be completed before January 1, 1882, then, and in either event, this proposal is and shall be void." And the county clerk was instructed to forward a certified copy of the resolutions to the company at New York.

That on the 12th day of November, at the request of the railroad company, the county board passed resolutions extending the time of acceptance to the 18th day of December, 1880.

That on the 16th day of December, 1880, the board of directors of the railroad company duly passed a

resolution accepting the proposition of Douglas county, as aforesaid, and a duly certified copy of such acceptance was transmitted to the county board.

That subsequently, on the 21st day of July, 1881, at the request of the railroad company, the county board extended the time for the completion of the railroad until the 31st day of December, 1882; but that the railroad company did, in fact, construct, build and equip the line of road according to the arrangement, during the year 1881, expending over $700,000 in all upon its various lines in the county of Douglas, and has ever since maintained and operated the same.

That on the 18th day of January, 1882, the county board, reciting the previous action, resolved that the county would release and convey by quitclaim deed certain lots, blocks, pieces and parcels of land conveyed by private parties to the railroad company upon which the county might have some claim, and also that the county, in pursuance of the said agreement, would release and convey to the railroad company, by quitclaim deed, all the lots, blocks, pieces and parcels of land described in a list thereto annexed, as being property embraced within the terms of the former resolution; and that accordingly, upon the 20th day of January, 1882, the county clerk executed a quitclaim deed to the complainant, of said lands, a long description of which follows.

The bill then states, in a summary fashion, the various tax deeds to the county of Douglas by which title was derived by that county, their due record, and the force of the statute of limitation of the state in barring claims by the former owners. The bill next avers that certain of the lands described in the deed, compara-

tively few in number, are, "and during all the time since the same were so deeded" have been, in the actual possession, use and occupancy of the complainant; that its railroad is constructed upon them and that it has used them in connection with its operation, and that the value of the same is more that $10,000.00.

That as to the remainder of the lands conveyed, they were at the time of the execution of the tax deeds and ever since have been " vacant and unoccupied, and not in the possession of any one whomsoever, save in so far forth as the same have been in the constructive possession of your orator, and its grantor, the said Douglas county, by operation of law," and that the same are of the value of $200,000.00. That when the proposition was made by Douglas county the land had no market value whatever, and the county was unable to sell the same for the amount of the tax lien, or for any sum whatever, and that being lands of the county they were non-taxable, and no income could be derived therefrom that since they were so conveyed this complainant has paid the taxes levied thereon every year, amounting in all to more than $5,000.00; that by reason of the construction and operation of said railroad this real estate with all other real estate in the county has greatly appreciated in value and large revenue from increased taxes been derived.

The bill then avers that the legislature, by chap. 150 laws of 1883 " approved and ratified the act of said Douglas county in so contracting with your orator as aforesaid, and in so conveying to your orator said lands and premises, and therein declared said conveyance to be valid and effectual to vest in your orator the title to the land conveyed or attempted to be conveyed by said

deed." That complainant's title remained undisputed until the month of July, 1888; that in the meantime, and on the 20th of January, 1882, the complainant sold to divers and sundry persons a large number of the parcels of land so conveyed to it, and their titles were based upon the deed to complainant.

The bill then sets forth that the county board did, on the 6th day of July, 1888, pretend to sell to the defendant Roberts, for the sum of $335.00, all the pieces and parcels of land conveyed as aforesaid to the complainant, and the county clerk made and executed a deed accordingly, which was duly recorded in the office of the register of deeds for the county; that as that deed omitted several parcels of land, a second deed, bearing date the 7th of March, was made by the county to Roberts and likewise recorded in the office of the register of deeds for the county; that the two deeds cover and embrace, among other lands and premises, all the pieces and parcels of land hereinbefore mentioned and described and that no greater consideration than $385.00 was paid to the county by Roberts.

The bill next avers that the defendants claim a part of the land under a certain tax deed to Roberts, dated July 12th, 1888, and duly recorded, to which reference is made; but that the certificates upon which that tax deed was issued to Roberts were certificates issued to Douglas county upon the tax sale for the year 1877, for the taxes for 1876, and were held by the county at the time when it made the conveyance to the complainant and any claim to title based upon such certificates passed to the complainant. It is then averred that the appellant Roberts conveyed to the appellant Ellis by quitclaim duly recorded, a portion of the lands and

premises, (and another portion to Johnson, as to whom the bill is dismissed) and that Roberts still claims to own the lands not so deeded to Ellis and Johnson.

And averring that the deeds from Douglas county to Roberts and from Roberts to Ellis and Johnson were fair upon their face and constitute a cloud upon the title of complainant, the bill prays decree that the title to said lands and premises be quieted in the complainant and that defendants be barred from any claim, and that their deeds aforesaid be held void and of no effect.

Subpœna being served the defendants entered their appearance on the 6th day of January, 1890, and on the 28th day of January, 1890, the appellants Roberts and Ellis, each separately filed a demurrer and plea to the bill. The demurrer of Ellis proceeded on two grounds; first, want of equity, and secondly, multifariousness in the bill. His plea averred that none of the lots or tracts of land mentioned in the bill, which were conveyed by Roberts to him, were, at the time of the commencement of the suit, or at any time prior or subsequent thereto, occupied or in the possession of the complainant, or any part or portion thereof; and further set forth by particular description the lands which had been conveyed by Roberts to him, and denied any interest, right or title in or to any other of the lands described in the bill of complaint.

The demurrer of Roberts stood also upon the two grounds, want of equity and multifariousness; and his plea averred that none of the lots or tracts of land mentioned in the bill, the title to which was in the defendant Roberts, "were at the time of the commencement of this action, or at any time prior or subsequent

to such time, occupied by or in the possession of the complainant, or any part or portion thereof;" and that the title to only certain of the lands remained in Roberts, and that he had no interest, right or title to any other of the lands described in the bill of complaint.

These demurrers and pleas were set down for hearing on the 20th of March, 1890, and having been then heard, were, by an order of April 12th, 1890, overruled, and the defendants given leave to answer.

ANSWER. The appellants, Roberts and Ellis, joined in their answer, which was filed the 20th of May, 1890. They admitted the adoption of the resolutions by the county board of Douglas county and the making of the conveyance accordingly; but averred that such conveyance was wholly without consideration, that said lots and lands were donated by the county to aid the railroad company in building its road in that portion of Douglas county on the line designated; that no stock of the railroad company, or bonds, or other consideration was given or intended to be given or offered for such conveyances; that said resolutions were never authorized or directed or ratified by a vote of the people of the county, nor ever submitted to the people; but the acts and agreements of the county board were arbitrary and wholly unauthorized and void. And averring the county's title to the property and the want of authority of the county to convey to the company, the answer set forth that the county board, acting upon the assumption that the former conveyance was void, for a good and sufficient consideration, sold and conveyed the said lots and lands, on the 6th day of July, 1888, to the defendant Roberts, who conveyed a portion

of them, in the answer particularly described, to the defendant Ellis, and another portion to Johnson, and other tracts to other parties.

The answer then pleads particularly the bringing of the suit by the defendant Ellis in the circuit court for Douglas county against the railroad company to quiet his title, and the then pendency of the same on appeal in the supreme court of the state, in which action was involved the same and every question involved in this suit, and especially the validity of the conveyance to the railroad company by the county; and the answer asserts that this suit was brought especially to avoid and evade the judgment and determination of the state courts.

(Record, folio 47.)

The answer then proceeds to allege that, except a few tracts mentioned upon which the roadbed of the railroad is laid, no part of the lands are in the possession of the complainant, but all were and have been vacant and unoccupied for more than ten years; the lots and blocks being designed for building purposes, and the residue being farming lands and not lying contiguous to each other.

The defendants deny that the railroad company expended any money in reliance upon its pretended contract with the county board of Douglas county, but aver that the complainant had already resolved to construct its road beyond the point named, and to Ashland, in Ashland county, Wisconsin, which would necessarily pass in close proximity to the platted portion of the village of Superior; and then through its agents the company conceived the plan of exacting aid from the county

of Douglas and its citizens, "and formulated the proposition and resolution set forth in said bill."

They also deny that the lands had no market value at the time, but insist they were worth more than the tax liens upon them. They deny that the real estate of the county has appreciated in value by reason of the construction of the complainant's road, which is said to have had very little effect, but attribute the increase in values to other causes set forth.

The invalidity of the act known as chapter 150, of the laws of 1883, is then asserted; and all confederacy or combination denied; with averment that the defendant Roberts purchased the lands from the county in good faith and for the consideration named, which was at that time the actual value of the title, that had been clouded by the previous action of the county board.

They deny also that the certificates of sale which were made subsequent to the conveyance to the complainant and assigned to the defendant Roberts were wrongfully obtained by him, or that the complainant had any right or title thereto whatever, but aver they were bought by defendant in good faith and for a valuable consideration. A particular description of the lands conveyed, the title to which remains in Roberts, is given, and of those conveyed to the defendant Ellis: and, proffering to pay the complainant the taxes it has paid on the lands since the conveyance by Douglas county, the answer concludes with a prayer for dismissal of the bill, etc., together with the decree that the defendants be adjudged owners, etc.

No Replication was filed, but the case stood from May until November without further steps taken. Mean-

time, the suit in the state court having been determined by the supreme court on appeal against the complainant, the defendants asked leave to file a supplemental answer setting forth the judgment of the supreme court of the state, (Record, fol. 65 *et seq.*) and the complainants took an order setting the case down for hearing upon the complaint and answer of the defendants Ellis and Roberts on the 18th day of November, 1890, (Rec., fol. 54).

The case was then heard upon the pleadings and the motion of the defendants for leave to file their supplemental answer, and submitted. On the 11th day of February, 1891, the court entered an order directing a final decree in favor of the complainant, and at the same time denied the application to file a supplemental answer. The formal decree was entered on the 2d of March, 1891, adjudging that the complainant is the full legal and beneficial owner of the tracts described, that the conveyances by the county board to the defendant Roberts, and the deed from Roberts to Ellis, and the claim of title by the defendants Roberts and Ellis, are invalid and of no force and effect; and enjoining the defendants from asserting any claim of title under said deeds, or under the tax deed to Roberts dated July 12th, 1888; with costs, etc. and also allowance of the defendants' appeal. Appeal with proper bond was duly taken from this decree, and upon the record presented its reversal is respectfully sought.

The questions presented to this court all lie upon the face of the record, involving no dispute of fact. They arise,

First, upon the bill and demurrers and pleas, and

Secondly, upon the bill and answer.

So that the pleas and answer stand admitted in every particular, as the facts are therein averred.

The substantial questions upon the merits relate,

First, to the validity of the alleged contract between the county board and the complainant; and, that being invalid,

Second, to the effect of the subsequent act of the legislature.

Third, to the respect due the priority of suit and priority of adjudication in the state court.

And here the primary question is, Shall not the constitution and laws of the state govern? Or shall foreign opinion impose another rule upon the particular tracts of land mentioned in this suit than that which obtains with all other in the state?

And next, ought not the prior adjudication of this particular controversy by the state court, whose jurisdiction first attached and was accepted by this complainant, to be respected by the federal judiciary?

Questions also arise upon the pleadings whether the bill can be maintained within the rules of equity.

First, upon the demurrers, because the bill is multifarious,

Secondly, upon the bill and answer, because the plaintiff sues to remove a cloud without being in possession.

THE ERRORS ALLEGED

are

1. The overruling of the demurrers and pleas,
   a. Because of the general reasons below;
   b. Because the bill is multifarious.
2. The denial of the supplemental answer;
3. The order for a decree in favor of the plaintiff and appellee; and
4. The decree accordingly;

For the several reasons, in substance, that

The court below erroneously denied to the constitution of Wisconsin its force and effect;

Erroneously disregarded the interpretation of that instrument as unmistakably and repeatedly given by the supreme court of the state, *long prior* to the transaction in question;

Erroneously refused to follow the long and well-settled rule of decision of the state court in a matter of local, infra-state concern, going to the title of land within the state, and when the transaction occurred after the rule of decision was notorious.

The court below, finding itself moved by a suitor which, although entitled to a removal to the federal jurisdiction, had first submitted itself and its cause to the state circuit court and there contested until the decision was unfavorable, after which it had by appeal further invoked the jurisdiction of the state supreme court, and by that suitor asked to take up and adjudge under such circumstances the same identical controversy depending in the state court, erroneously disregarded the prior pendency of the suit in the state court and its

prior adjudication of the controversy, but entertained and proceeded with this suit in denial to appellants of their objection thereon founded;

Erroneously refused leave to plead the complete and prior adjudication by the state court of the self same controversy;

Erroneously denied to the judgment of the state court the full force and effect which ought to have been awarded it, and

Erroneously decided in favor of the defeated party in the state court in reversal of the judgment of the highest court of the state, determining contrary thereto the interpretation of the state constitution and the title to land within the state.

The court below also proceeded erroneously upon a bill *quia timet* to remove a cloud upon complainant's alleged title to land of which it was never in possession.

I.

The Supreme Court of Wisconsin, interpreting and enforcing the Constitution of the State, has authoritatively adjudged that no municipal corporation, county, town or city, can bestow public property upon a railroad company as an aid or inducement to its building any line of road. Long before the transaction in question, repeated decisions of the court declaring and recognizing this law had been made and published, and the constitutional limitation so settled was notorious.

This proposition will not be questioned.

In 1869, at its June term, the supreme court of the state rendered its judgment in the locally-famous case of *Whiting vs. The Sheboygan and Fond du Lac Railroad Company*, (25 Wis., 167), by which it was decided that the state constitution denied all power or right in municipal corporations to give public property for private purposes, or even for such quasi-public purposes as railroads, and prohibited the legislature from conferring such power by any act; that stock subscriptions to railroads, although a breach of the rule, had by so many decisions, been so long tolerated as to have secured place as an exception; but beyond that exception the constitutional limitation must be imperatively observed and maintained. After review of it, with elaborate argument, upon a motion for re-hearing, the court adhered to this interpretation, and filed an additional opinion at the January term, 1870.

In 1871, at its June term, in *Phillips vs. The Town of Albany* (28 Wis., 340), the court, affirming the exception in favor of a stock subscription, under the rule *stare decisis*, reiterated its determination to adhere to the limitation declare in the *Whiting* case.

Again, in 1872, in *Rogan vs. The City of Watertown* (30 Wis., 264), the Whiting case was referred to with approbation.

In 1878, in *Bound vs. the Wisconsin Central Rail Roaa Co.* (45 Wis., 543) there was renewed expression by the court of its adherence to the prescribed limitation.

From the decision in the Whiting case to this day, there has never been the least qualification of or variation from that interpretation, nor want of complete understanding or acceptance of it by the profession and the public. Much additional notoriety was given that construction because this court, in *Olcott vs. The Supervisors*, 16 Wall., 678, disagreed with the state court in opinion, and, having the basis that the county orders in question had been issued before the interpretation was declared and while a different one had received colorable support at least, sustained and enforced the same obligations the supreme court of the state had adjudged invalid in the Whiting case.

It can not, therefore, be open to question that under the state constitution, as authoritatively construed by the highest state tribunal, the transaction between the county board of Douglas county and the appellee, and as well the act of the legislature subsequently procured in the attempt to validate it, were without legal force and effect; nor could it be doubtful beforehand that such would be the judgment of the state supreme court, adhering to its line of decisions. No hope of a differ-

ent result in that tribunal could be entertained, except by its complete reversal of former judgments and the overthrow of the constitutional limitation as theretofore adjudged to exist; and, in point of fact, that was the exact and only effort of the railroad company, in argument on the subject in the state court.

When, therefore, the supreme court of Wisconsin was presented by the company's appeal with the action first brought by the appellant Ellis, as before stated, it naturally, inevitably said (*Ellis vs. N. P. R. R. Co.*, 77 Wis., 118–19): "There is nothing to distinguish this case, or to take it out of the decision in the *Whiting case;* for if the county could not donate money or securities to a railroad corporation, it could not give it its lands, which are the property of the county."

And in response to the attempt to reverse the interpretation given the constitution in former years, it said: "And while the distinction between a stock subscription and a donation or other appropriation of public money or corporate property to a railroad corporation is not very distinct and obvious, yet we are unwilling to extend a bad rule of law a particle beyond where the courts had carried it, and shall, therefore, adhere to the doctrine of the Whiting case. *Besides, that case has been fully approved in subsequent cases in this court;*" and reference is thereupon made to those already above referred to. The invalidity of the act of the legislature of 1883, inevitably follows, the court saying of course: "But if the legislature could not authorize the county in the first instance to donate its lands to the railroad company, it could not cure or make valid such a donation after it had been made."

Nothing needs be further said, therefore, to demonstrate the proposition that, in Wisconsin, the convey-

ance by the county board of Douglas county to the appellee passed no title, or that to abide by the limitations of the constitution of the state, as adjudged by its highest tribunal, requires such decision by the federal judiciary in this suit.

It may be added, moreover, that public approbation has always since strongly supported this construction, and its fruits have been so beneficial that time and experience have served only to harden its strength, both in judicial and popular judgment.

The transaction in question took place in the face of this long-previously established constitutional limitation, and can now be supported in this court only by its overthrow in utter disregard of the supreme court of the state, and although its rule of decision was then fixed and notorious.

II.

The general principle that the Federal Courts are bound to accept the construction of a state constitution or state statute, and to follow the rule of decision in matters of local, infra-state concern, settled and maintained by the supreme court of the state, has been too long established by the decisions of this court to require argument or recall of cases.

Undeniably, that rule must govern decision now unless this case falls within some just and recognized exception. Here rises the first contention, and its consideration requires not only careful attention to the exceptions established by the judgments of this court, but justifies close review of the reasons which support the general doctrine as well as particular exceptions.

The foundation of all the reasons for the general principle, and as well for the just exceptions, lies in the nature of the relations between the federal and state governments. In all judicial controversies involving the powers and dignity of the federal government, the interpretation of its laws and treaties, the authority or responsibility of its officers, as in all involving the rights of different states in a particular subject, and some between a state and persons, citizen or alien, the final supremacy of this court is as natural and necessary as it is indubitably given by the constitution. In its own learning, wisdom and fidelity, lie the springs of all such judgments. All extraneous aids are advisory, carrying no

authority but in the strength of good counsel. It is the judicial law-giver of the federal nation, and its doctrines command the rightful reverence due its lofty jurisdiction quite as well as its particular judgments enjoy the power of federal government for their enforcement.

But within the state the supreme court thereof is equally entitled to a like supremacy in all judicial controversies involving the interpretation of the state constitution and laws, the powers and limits of all its inferior political divisions, corporations and agencies, the responsibility and authority of all its public officers, and all subjects of local infra-state concern, save only when these affect federal relations or touch somewhere a line of the federal constitution. Within the confines of the state its supreme court is as justly the judicial law-giver as this court in the nation, and its doctrines, in their application to every subject there confined, are entitled to the respect due the highest jurisdiction of human society.

To such infra-state subjects the jurisdiction of the federal court can but occasionally and fortuitously extend, resting mainly on the accident or circumstance of the citizenship of one of the parties. The honest mind is thus coerced to recognize that, while the power to render as to enforce its judgment still flows to the federal court from the federal government, the law of the state must determine that judgment and its judicial law-giver guide to knowledge of that law.

The obligation to respect the law of a state as settled by its supreme court is not matter of judicial comity; it stands on the duty to adjudge the law as it is, the duty of respect and obedience justly owing to human government in its best possible form and estate. It is pe-

culiarly incumbent on this great tribunal because, albeit from necessity, the federal constitution has entrusted to its supreme perception and care of the novel and delicate principles of the federal system, the power to trample on it, not less than the duty to observe it.

See remarks by Mr. Justice JOHNSON in *Fullerton vs. Bank of U. S.*, 1 Pet., 604.

This obligation is similar in nature to that which demands obedience to the statutes of the nation, or, in proper cases, the statutes of a state. That rests not on the court's approbation of the law declared by the agencies of society for making it, but upon the fact that it is so established.

So with acceptance of state law from the state's highest tribunal as its oracle. There would be nothing in the doctrine acknowledged and established if the rule of decision of the state court were accepted only when it was acceptable to this court for the reasons which should commend it intrinsically. Such a view of the obligation of respect would demand special examination in every instance, to result in disregard or obedience, independently of the authority of the state tribunal. The principle settled by this court awards force to the law of the state as declared by its judicial authority, solely because thus the law is to be known.

It is argument *ab inconvenienti*, however strongly confirmatory, which pleads the excellence of judicial comity, the indecency of conflicts in judgment between high judicial tribunals which ought ever to command veneration, as much as obedience, from the people, the odious spectacle of diverse enjoyment of property derived from the same source, and the public perils which such practices menace. Law, whether flowing from legis-

lative enactment or judicial exposition, carries its force not in the good reasons which approve its doctrines, but in the authority of human society authorizedly promulgating it. And such is the just authority of the state tribunal in giving exposition to the constitution and laws of the state to govern affairs within its own borders.

In *Elmendorf vs. Taylor*, 10 Wheat., 159, *et seq.*, this is strongly put by MARSHALL. And by MCLEAN, J., in *Green vs. Neal's Lessee*, 6 Pet., 291.

Study of the exceptions to the general doctrine adds clear confirmation to this reasoning. There are two requiring consideration in this connection, and both stand, as does the general principle, upon the constitutional recognition of the relations of states and citizens in federal union, to protect the rights ensuing therefrom.

First, when a contract or transaction has been undertaken and rights accrued accordingly under a course of decision by the state court favorable to its validity, the federal court may rightfully claim to pursue that rule of decision as showing the law which governed the action of the parties, although subsequently a change by the state court would operate a change of the law affecting later cases.

Secondly, when at the time of the accruing of rights under a contract or transaction, no decision by the state court had been made of the point in question, so that it is presented to the federal tribunal to determine what the law was as an original inquiry, as it was presented to the parties when they entered into the contract or transaction, the right may be properly exercised, indeed, the duty is clear, to give an independent judg-

ment, uncontrolled by the opinion of the state tribunal rendered afterwards.

The general rule and such exceptions were stated, evidently with great care, after thorough review of former judgments, by Mr. Justice BRADLEY, in *Burgess vs. Seligman*, 107 U. S., 33, as follows:

Since the ordinary administration of law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony, and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt."

To this exposition he appended a nearly complete collection of the cases in this court, not necessary to be repeated. The following, among later judgments, have given added sanction:

Bausermann vs. Blunt, 147 U. S., 647.
Anderson vs. Santa Anna, 116 id., 356.

Balkam vs. Woodstock Iron Co., 154 id., 177.
Powell vs. Brunswick Co., 150 id., 433.
Norton vs. Shelby Co., 118 id., 425.
Gormelly vs. Clark, 134 id., 338.
Stuttsman Co. vs. Wallace, 142 id., 293.
Bucher vs. Cheshire Rd. Co., 125 id., 555.

This case so clearly falls within the general rule and without either exception to it, that here argument would seem to end in adjudication accordingly. And so, in fact, the result below would doubtless have been but that the learned district judge felt himself bound by the opinion in *Olcott vs. The Supervisors*, already referred to.

That case, so far as the point now under discussion goes, stands perfectly within the second exception already stated, if not, perhaps, within the first. The opinion indeed vigorously argued that former decisions of the state supreme court had recognized the power, notwithstanding the state court itself had, when reviewing, in the Whiting case, the very same judgments, drawn a different conclusion. But, beyond dispute, it was at least certain that prior to the determination in Whiting's case, the supreme court of Wisconsin had not adjudged the constitutional interpretation which forbids counties in Wisconsin to donate aid to railroads, and the legislature from authorizing them. And, as the court, in the case of *Olcott vs. The Superivsors* was passing upon the selfsame securities to which the controversy in Whiting's case related, the case here was one of first impression, in which the law, as it stood when the contract for donation was made, was to be ascertained from the same sources which the parties to it

were forced to accept. Thus this court, in determining the force of the obligation assumed by the parties, made *for that case* its own interpretation of the constitution of Wisconsin. So far, the case is within reason and authority, and lines clearly drawn.

But in the course of its argument, that opinion, needlessly and therefore *obiter*, seems to assume a *third* exception to the general rule; for it asserts as one basis of the right of this court to pass an independent judgment, that the *reasons* of the supreme court of Wisconsin for the interpretation it gave to the state constitution were *general*, depending on the nature of railroads and their relation to the state, and *therefore* the interpretation was not a local matter and was subject to review by this court. It said:

"That *Whiting vs. Fond du Lac County* was not the determination of any question of local law is manifest. It is not claimed to have been that. But it is relied upon as having given a construction to the constitution of the state. Very plainly, however, such was not its character or effect. The question considered by the court was not one of interpretation or construction. The meaning of no provision of the state constitution was considered or declared. What was considered was the uses for which taxation generally, taxation by any government, might be authorized, and particularly whether the construction and maintenance of a railroad, owned by a corporation, is a matter of public concern. It was asserted, (what nobody doubts), that the taxing power of the state extends no further than to raise money for the public use, as distinguished from private, or to accomplish some end public in its nature, and it was decided that building a railroad, if it be constructed and owned by a corporation, though built by the authority of the state, is not a matter in which the public has any interest, of such a nature as to warrant taxation in its aid. For this reason it was held that the state had no power to authorize the imposition of taxes to aid in the con-

struction of such a railroad, and that therefore the statute giving Fond du Lac county power to extend such aid was invalid. This was a determination of no local question, or question of statutory or constitutional construction. It was not decided that the legislature had not general legislative power; or that it might not impose or authorize the imposition of taxes for any public use. Now whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has as much reference to the constitution of any other state as it has to the state of Wisconsin. Its solution must be sought not in the decisions of any single state tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power are matters which, like questions of commercial law, no state court can conclusively settle for us. This consideration alone satisfies our mind that *Whiting* vs. *Fond du Lac County* furnishes no rule which should control our judgment, though the case is undoubtedly entitled to great respect."

Not even the counsel, an eminent lawyer, went so far to invoke the judgment; and if that opinion is to be taken, not as mere argument to support the interpretation there placed on the constitution of the state, but as attempting to define a third exception to the general rule of obedience to state law as settled by the state court, it appears indefensible.

It assumes, first, that the nature and value of the decision of the state court depend upon the *reasons* on which it is based; and, secondly, that if the constitutional limitation declared by the state supreme court depends, not on express words, but upon reasons of a general character, which one court as well as another might entertain, then it is no constitutional limitation at all, and the federal courts may disregard the restriction on the legislative power which the state courts will enforce.

Now this is mere confusion, the clamor of Babel, every case vociferating its own law, every judge's hobby neighing. It contemns every good, exalts every bad reason for the general doctrine of the court; and at the same time overthrows the doctrine itself, since such an exception destroys it; for if this court follows only because governed by the same reasoning, it follows only in the sense that its decision comes later.

And what shall be said in the serenity of present review of that controversy over municipal bonds which once so troubled the judicial mind (in whose highest flame the decision in Olcott's case was written), of the proposition that the question of a legislature's power to pass a law is not a constitutional question? That—no line of federal right being involved—the power of a state legislature is not a matter of local, state law; and that adjudication of limitations on a legislature, deriving its authority from a state constitution, is not interpretation or construction of it?

The opinion concedes that the legislative taxing power extends no further than to raise money for public use. Why, but for the restriction implied from the provisions of the state constitution? Would it be denied that a state constitution might in unmistakable terms grant such legislative power?

And if the general restriction be by the constitution, is it not matter of constitutional construction for the judiciary to define its application?

Equally plain is it that such a question, whether of constitutional construction or general law, is purely local; of state extent only. It relates to powers which a municipality of a state may exercise, a corporation purely domestic, entirely within the state and state con-

trol. Municipal corporations derive their very existence, as all their powers, from state law, and beyond the state have no authority. Locality is of the essence of their being, and all their functions. The vice of this part of the opinion in Olcott's case lies in misdirection of ideas, sticking in the bark of the mere reasoning of the state court.

Nothing can put clearer the local character of this question than this court's opinions in *Claiborne County vs. Brooks*, 111 U S., 400; *Detroit vs. Osborne*, 135 U. S., 492; *Chicago Union Bank vs. Kansas City Bank*, 136 U. S., 223; *Norton vs. Shelby County*, 118 U. S., 425.

And is no interpretation of a state constitution valid which does not pursue express words in the instrument, none to be respected which stands upon reasons which are general, none whose reasons any court may weigh unless it shall also approve? Are there on any questions any reasons, general or particular, beyond intelligent understanding here, wherefore the state court must be sometimes followed, though not at others?

Such a theory overlooks the high ground this court occupies by the doctrine discussed. It does not submit to the state court, led by its reasoning, or leaning in courteous obeisance; but, exercising its own authority, it enforces the law governing the case. Said MARSHALL, in *Elmendorf vs. Taylor*, 10 Wheat., 160:

"We receive the construction given by the state courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that *construction* than to depart from the *words* of the statute. On this principle the construction given by this court to the constitution and laws of the United States is received by all as the true construction; and on the same principle, the construction given by the courts of the several states to legislative acts of those states, is *received as*

true, unless they come in conflict with the constitution, laws or treaties of the United States."

And so, in this clear light, spake Mr. Justice FIELD, (in *Christie vs. Bridgeon*, 4 Wall., 203.)

"The interpretation, within the jurisdiction of one state, becomes a part of the law of that state, as much so as if incorporated into the body of it by the legislature. If, therefore, *different interpretations* are given in different states to a similar local law, that law in effect becomes, by the interpretation, so far as it is a rule for our action, *a different law* in one state from what it is in another."

How doubly applicable to the interpretation of the constitutions of the several states! And in particular, to such interpretation as stands upon *general* reasoning, since all powers not granted or prohibited are reserved to the state or the people, and of necessity the restrictive interpretation must lie on general reasoning to an indefinite extent. Will it be said the interpretation which, though wholly based on general reasoning, denies legislative right to bestow public property to private use, is less obligatory because not express in words? Or that railroads shall be excepted from this limitation in those states where the state courts hold they shall not, merely because in other states the exception is allowed and this court takes that view? Where, then, would be state individuality?

Without enlargement it is respectfully submitted that the foregoing excerpt from the opinion in Olcott's case was unnecessary to the judgment in it, and is contrary to the weight of authority as well as the clear and settled reasoning in this court, and cannot be regarded as law.

Olcott vs. The Supervisors also ruled the decision below because it was this court's interpretation of the state constitution and supposed binding on the inferior federal court.

The same principles, together with direct and authoritative application of them by this court, likewise dispose of this position. This court applied to *Olcott vs. The Supervisors*, the law as it found it at the date of the transaction. It is due to this case also to apply the law as it finds it to have been when the transaction took place; and at that time it had undergone a change from what the court found it when Olcott's case was ruled; a change arising from a clear, well-settled and maintained course of decision by the supreme court of the state, whereby the constitution of the state is seen to withhold power from the legislature to authorize the giving, or of a county to give, public property to aid the construction of a railroad. Both cases are rightfully to be decided by the same rule, the law of the state when the transaction occurred; and this court does not change its principles of judgment because it pursues the changes of state law resulting from judicial exposition, more than if from legislative action.

This just and inevitable conclusion from principle was early recognized and established when this tribunal disregarded its own determination in *Patten's Lessee vs. Easton*, decided in 1816, and reaffirmed in *Powell's Lessee vs. Harman*, 2 Pet., 241, in order to apply to the case of *Green vs. Neal's Lessee*, (6 Pet., 291), the law of Tennessee as it had later been authoritatively settled by the supreme court of that state. Said this court then, in the opinion of McLean, J.:

"The same reason which influences this court to adopt the construction given to the local law, in the

first instance, is not less strong in favor of following it in the second, if the state tribunals should change the construction. * * * * There should be no hesitation in so modifying our decisions as to conform to any legislative alteration in a statute; and why should not the same rule apply where the judicial branch of the state government in the exercise of its acknowledged functions, should, by construction, give a different effect to a statute from what had at first been given to it? The charge of inconsistency might be made, with more force than propriety, against the federal tribunals, for a disregard of this rule, than by conforming to it. They profess to be bound by the local law; and yet they reject the exposition of that law which forms a part of it. It is no answer to this objection that a different exposition was formerly given to the act, which was adopted by the federal court. The inquiry is, what is the settled law of the state, at the time the decision is made. This constitutes the rule of property within the state, by which the rights of litigant parties must be determined."

Again, in *Suydam vs. Williamson*, 24 How., 427, and in *Leffingwell vs. Warren*, 2 Black, 599; and recent approval of these cases was given in *Balkam vs. Woodstock Iron Company*, 154 U. S., 177. And in *Supervisors vs. United States*, 18 Wall., 71, this court said:

"We have even held that when the construction of a State law has been settled by a series of decisions by the highest State courts differently from that given by an earlier decision of this court, the construction given by the State courts will be adopted by us. And we adopt the construction of a State statute settled in the courts of the State, though it may not accord with our opinion."

And there a similar question to that in Olcott's case was reviewed and the state court followed with this explanation, directly applicable here:

"It is insisted, however, that in *Butz vs. The City of Muscatine*, this court ruled that section 3275 of the code

did give power to the city councils of Muscatine to levy a special tax beyond the statutory limit of ordinary city taxation, sufficient to pay a judgment which had been recovered against the city. This is true. But the facts in that case must be considered. The judgment had been recovered upon bonds issued by the city in 1854. At the time they were issued, no decision had been made by the supreme court of the state to the effect that section 3275 was not an enabling statute authorizing a tax beyond that allowed by other statutes. It was not until nine years afterwards that the supreme court of the state was called upon to determine its meaning. Hence this court felt at liberty to adopt its own construction, and to apply it to the case of the holder of the bonds, though it was adverse to that announced by the state court years after the bonds had been issued. But at the same time it was said, 'If the construction given by the state court to the statute had preceded the issuing of the bonds, and become the settled law of the state before that time, the case would have presented a different aspect.'"

Ober vs. Gallagher, 93 U. S., 199, recognizes the same rule; and in *Town of South Ottawa vs. Perkins*, 94 U. S., 260 the court said of the question whether a law was constitutionally enacted: "Otherwise we should have the strange spectacle of two different tribunals, having co-ordinate jurisdiction in the same state, differing as to the validity and existence of a statute of that state, without any power to arbitrate between them. In speaking, however, of their jurisdiction as being co-ordinate, it is only meant that one has no power to enforce its decisions upon the other. As a matter of propriety and right, the decisions of the state courts on the question as to what are the laws of the state is binding upon those of the United States."

Again, in *Fairfield vs. Gallitan*, 100 U. S., 47, this court reversed the rule of its own decision in the previous case of *Town of Concord vs. Portsmouth Savings*

Bank, 92 U. S., 625, to follow the constitutional interpretation of the supreme court of Illinois in respect to the validity of a donation to a railroad company, the same justice writing the opinion who wrote that in *Olcott vs. The Supervisors*.

And *Rowan vs. Runnells*, 5 How., 134, is no less to the same effect by the clear distinction drawn to show it within the same reasoning. This was so substantially said by the writer of that opinion himself, Chief Justice TANEY, in *Nesmith vs. Sheldon*, 7 How., 812.

It adds something at least of satisfaction to reflect that the pursuit of this principle will relieve the unseemly and embarrassing predicament in which the decree appealed from has placed the law and property rights affected.

It need not be held up as a product of our government that the constitution of a sovereign state means one thing for its own citizens and another for aliens or citizens of other states; that a law is valid out of the state which is null within it; that the legislature may exert powers which the supreme court of the state declares it does not possess; that two supreme tribunals shall contest in judgment with no arbiter between them; and that the same conveyance shall pass title and shall not pass title, to lands described in it, because two great courts cannot find a rule of decision to govern alike in both the question of a grant.

III.

The State court of Wisconsin first acquired a complete jurisdiction over this entire controversy; it was adequate to its full determination; the opinion of the highest court of the state, invoked by the appellee, and conclusive against the deed by which it claims, was rendered before the hearing of this cause in the lower court; and it ought to have been respected as an estoppel.

A. That the decision of the state supreme court in the action of Ellis against this appellee is in law, of itself, a complete estoppel, seems too obvious for discussion. Assume, for a clear view, that this suit was not brought until after the final judgment on the last appeal in that case.

It would then stand that *Ellis*, in privity of estate with Roberts by virtue of the latter's grant, had obtained final judgment that the deed of the county of Douglas to the appellee was null and void, and passed no title to the seven lots or parcels to which that suit extended. So far it assuredly now is an absolute bar. But equally absolute it must be as an estoppel against the appellee in favor of Ellis and Roberts in at least any *subsequent* action or suit, because the invalidity of the entire deed of conveyance, to all lands described in it, not less than the seven pieces, was the exact and essential point in judgment.

In *Cromwell vs. Sac County*, 94 U. S. 351, the distinc-

tion between the force of a judgment as a bar and as an estoppel is clearly presented, and the conclusiveness of the estoppel shown.

Authority is abundant from every quarter.

Railroad Co. vs. Blossburg, 20 Wall., 137.
Herman on Estoppel, Secs. 99, 115, 120.
Livestock Co. vs. Butchering Co., 120 U. S., 141.
Giles vs. Little, 134 U. S., 649.
Elgin vs. Marshall, 106 U. S., 578.
Carson vs. Dunham, 121 U. S., 421.
Lumber Co. vs. Buchtel, 101 U. S., 638.
Wilson's Execrs. s. Dean, 121 U. S., 525.
Goodrich vs. The City, etc., 5 Wall., 566.
Packet Co. vs. Sickels, ibid., 580.
Aurora City vs. West, 7 Wall., 82; 96, et seq.
Dupasseur vs. Rochereau, 18 Wall., 130.
Beloit vs. Morgan, ibid., 619; 621 et seq.
Bigelow on Estoppel, pp. 35–46.
Sawyer vs. Woodbury, 7 Gray, 499.
Heath vs. Frackelton, 20 Wis., 320.
Strong vs. Hooe, 41 id., 659.
Amory vs. Amory, 26 id., 152.
Lawrence vs. Milwaukee, 45 id., 306.
Driscoll vs. Damp, 17 id., 419.
Gardner vs. Buckbee, 3 Cow., 120.
Merriam vs. Wittemore, 5 Gray, 316.
Burt vs. Sternburg, 5 Cow., 559.
Banchaud vs. Dias, 3 Den., 238.
Doty vs. Brown, 4 Comst., 71.
Smith vs. Way, 9 Allen, 472.
Faye vs. Patch, 132 Mass., 105.
Demorest vs. Darg, 32 N. Y., 281.
Railway Co. vs. Allen, 113 Ind., 308.

B. Not less certain is it that when once upon a writ of error or intermediate appeal the judgment of the highest court has been rendered upon any point in controversy, the resolution reached is *res adjudicata*, not to be reversed even by the same court on any subsequent presentation of the same case. The rule has been often enforced by this court, as by others, and in Wisconsin such has been the force of an intermediate judgment since the earliest cases.

Said RYAN, C. J., in *Lathrop vs. Knapp*, 37 Wis., 312: "The order of the court below sustaining the complaint and overruling the demurrer, was affirmed here by a divided court. Whether such a decision should have weight as authority, under the rule *stare decisis*, as was held in *Catherwood vs. Caston*, 13 M. & W., 261, need not now be considered. But I cannot entertain a doubt that all the questions settled by the judgment of this court on the demurrer are *res adjudicatæ* in this cause, in this court, and in all courts, and with the same effect as if that judgment had been pronounced by a unanimous court."

Parker vs. Pomeroy, 2 Wis., 112.
Downer vs. Cross, ibid., 371.
Cole vs. Clark, 3 id., 323.
Hill vs. Hoover, 9 id., 15.
Pierce vs. Kneeland, ibid., 23.
Corwith vs. State Bank, 11 id., 430.
Wright vs. Sperry, 25 id., 617.
Noonan vs. Orton, 27 id., 300.
Cobb vs. Smith, 38 id., 21.
Dupont vs. Davis, 35 id., 631.
Johnson vs. Ashland Lbr. Co., 52 id., 458.
Fire Dept. vs. Tuttle, 50 id., 552.

Himely vs. Rose, 5 Cranch., 313.
Martin vs. Hunter's Lessee, 1 Wheat., 304.
Browder vs. McArthur, 7 id., 58.
The Santa Maria, 10 id., 431.
Ex parte Sibbald, 12 Pet., 491.
Corning vs. Troy Factory, 15 How., 451.
Sizer vs. Many, 16 id., 98.
Peck vs. Sanderson, 18 id., 42.
Roberts vs. Cooper, 20 id., 467.
Supervisors vs. Kennicott, 94 U. S., 498.
Pearce vs. Insurance Co., 96 id., 461.
Stewart vs. Saloman, 97 id., 361.
Clark vs. Keith, 106 id., 464.
The Neustra Senora de Regla, 108 id., 92.
Chaffin vs. Taylor, 116 id., 567.
Hickman vs. Fort Scott, 141 id., 415.
N. P. R. Co. vs. Ellis, 144 id., 458.

C. The supreme court of Wisconsin, in the judgment which this appellee had invoked by its appeal from the order of the state circuit court overruling its demurrer to the complaint of Ellis, had, therefore, conclusively adjudicated as between these parties that the deed from Douglas county to the appellee passed no title, and that the attempted cure of its invalidity by the act of the legislature was futile because the legislature possessed no constitutional power to pass it. *Ellis vs. N. P. R. Co.*, 77 Wis., 114. This decision controlled and substantially ended the litigation, for nothing else remained to be litigated; although by the practice prevailing in the state the defendant had leave formally to answer over; so that when again the de-

fendant appealed, the complete response of the supreme court was that the case had been already adjudicated. There remained nothing to consider.

Ellis vs. Northern Pacific R. Co., 80 Wis., 459.

And this judgment was rendered *before* the hearing of this case in the court below. Irrespective of the doctrine requiring acceptance of the law from the rule of decision in the state, this judgment ought to have been respected as an estoppel of the point in litigation.

First, inasmuch as the state court had first acquired jurisdiction and entered upon the course of determination of the controversy, with plenary power, as well as special adaption to it from the nature of the case, that deference was due from a court of concurrent and co-ordinate jurisdiction, so far as this litigation is affected. It is the settled rule that as between two such tribunals, whichever first obtains jurisdiction will retain control of the subject, unless removable under the statute from one to the other.

Sharon vs. Terry, 36 Fed. Rep., 337; 355 *et seq.*
Taylor vs. Carryl, 20th How., 583.
Freeman vs. Howe, 24 id., 450.
Smith vs. McIver, 9 Wheat., 532.
Pullian vs. Osborn, 17 How., 471.
Peck vs. Jenness, 7 id., 612.
Wiswall vs. Sampson, 14 How., 52.
Hagen vs. Lucas, 10 Pet., 400.
Wharton vs. May, 5 Vesey, 27.
Mocher vs. Reed, 1 Ball & Beaty, 318.
Wilson vs. Weatherhead, 2 Merivale, 406.
Edgecumbe vs. Carpenter, 1 Beav., 171.
Bunberry vs. Bunberry, 1 Beav., 318.

Wedderburn vs. Wedderburn, 2 Beav., 208; s. c., 4 M. & C., 595.
Schoole vs. Sall, 1 Schoales & Lef., 176.
Bell vs. O'Reilly, 2 id., 430.
Booth vs. Lycester, 1 Keen, 579; s. c., 3 M. & C., 461.
Portarlington vs. Soulby, 3 Mylne & Keen, 104.

Although the cases have happened mainly to relate to particular property on which process had been laid, the principle governs as plainly such a subject as real estate within the court's jurisdiction to which its decision extends to control the title. Here the subject in litigation was in reality all the property described in the deed, because the decision rendered was as effective in law to control the title to all as to the seven pieces named in the complaint, if "full force and effect" be given the judgment of the state court. And that such consequence must be awarded to the earlier determination by the state court, although the form of the suit be different from one later commenced in the federal court, has been explicitly decided here.

Stout vs. Lee, 103 U. S., 66.
Johnson Co. vs. Wharton, 152 U. S., 252.

Secondly, this final and conclusive judgment of the supreme court of Wisconsin the appellants asked leave to plead by way of supplemental answer, before the hearing of this cause in the court below. This was denied upon the theory that the case in the state court had not reached the stage of final judgment. The defendants had pleaded in their original answer the pendency of the suit in the state court, and the supplemental

answer was strictly germane and properly supplemental as showing the decision reached after the answer was filed.

Without pausing for refinement of argument upon the technical rules governing the defense of another action pending in a court of another jurisdiction, or whether a final and conclusive determination is technically an estoppel before it is incorporated in a final judgment, technically so denominated, it is respectfully submitted that the court below, in the exercise of a sound discretion, ought to have either followed the decision of the state court or stayed this suit until that court had, in the course of its practice, put that decision in the technical form of a final judgment.

Is such a contentious jurisdiction as here exercised to take the place of the just and necessary authority of the federal judiciary under the constitution?

Here was a litigation begun in the state court which the defendant there, the appellee here, might have removed into the federal court. Instead, it chose to speculate on the chances of success in the state court, submitting there to decision the material and governing question of its entire right to the land described in the deed of conveyance in question. Encountering an adverse decision in the lower state court, it set on foot the scheme of this suit, and, having thereafter prosecuted its appeal to the highest court of the state—while meantime this suit was kept during months ready for hearing—with the result of a judgment which, if awarded its full force and effect, would completely estop its maintenance of claim under the deed, now asks the federal judiciary not only to contemn the settled law of Wisconsin in respect to the powers of an inferior political subdivision and of the legislature, but

to do this in reversal of a judgment of the supreme court of that state conclusive of the particular controversy on the merits, according to the principles of this court, as well as all others. Is that to be supported upon a technical question of *time;* because the federal court hurried to a decree before the judgment of the state court—the appellee availing itself of the methods of state practice for the necessary delay—reached its technical form of a final decree? If so, a new procedure is provided for the citizen of another state, or a corporation of the United States, available in many litigations, and in all affecting real estate. Instead of invoking the federal jurisdiction by removal, he may experiment first with the state court, taking care only to institute a counter suit in the court of the United States so that it shall be pushed with all convenient speed to a decree, after the opinion of the state court shall, on some intermediate appeal, have been extracted, if that prove unfavorable.

The injustice, disorder and peril of such a jurisdiction, so exercised, need not be enlarged upon. Perhaps no case has been before this court in which a bolder disregard in principle of the respect and comity due the state courts has been shown, nor which would open the door so widely to judicial conflicts.

It is not needful to the relief which sound and well established principles governing the orderly administration of justice require to be afforded, that the technical plea of *lis alibi pendens* should be resorted to, or relied upon as the sole remedy; nor will a great tribunal of justice be netted in the cobwebs of practice forms. Doubtless the prior suit in the state court operated neither abatement of this suit in the federal court, nor impaired the latter's jurisdiction. Technically the sub-

ject was different, since different lands were affected. Usually, also, the plea is opposed by the same defendant to the same plaintiff, to whom it must be allowed to pursue his debtor in different jurisdictions. But these are the considerations of form, merely, subordinate to the requirements of justice and sound doctrine. Here, a defendant, first accepting the contest in the state court, after engagement there, seeks to elude the force of its judgment by contriving this appeal to another.

The remedy is as easy, without disregard of technical rules, as the right is clear; a stay of proceedings to await the proper legal formulation of the decision first rendered. This has repeatedly been adopted in the circuit courts and deserves the sanction of this tribunal in such a case.

In *Sharon* vs. *Terry*, *supra*, page 363, *et seq.* Mr. Justice FIELD discusses this as the proper course to be pursued by the court which acquired the later jurisdiction in a case where, as here, decision of the point in controversy in the first ought to control both.

The Tubal Cain, 9 Fed. Rep, 834.
Hurd vs. Moiles, 28 id., 897.
Howlett vs. Central etc. Co., 56 id., 161.
Lynch vs. Hartford Ins. Co., 17 id., 627.
Radford vs. Folsom, 14 id., 97.

And said this court, through Mr. Justice MATTHEWS, in *Covell vs. Heyman*, 111 U. S., 176.

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but between state courts and courts of the United States, it is some-

thing more. It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent, and although they co-exist in the same space, they are independent and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, the *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by foreign process is futile and void."

IV.

This Court has repeatedly decided that a bill of this nature is not sustainable in equity unless the plaintiff be in possession.

Orton vs. Smith, 18 How., 263.
United States vs. Wilson, 118 U. S., 86.
Holland vs. Challen. 110 id., 15.
Reynolds vs. Crawfordsville Bk., 112 id., 405.
Chapman vs. Brewer, 114 id., 158.

This is, of course, qualified as to such states as by statute provide for the maintenance of such suits by one not in possession.

Holland vs. Challen, supra.

But, in Wisconsin, the statute grants the remedy in terms only to a plaintiff in possession, construed to mean actual possession.

2 Ann. Stat., sec. 3186, p. 1804.
Wals vs. Grosvenor, 31 Wis., 681.
Leihy vs. Ashland Lumber Co., 49 id., 165.
Gunderson vs. Cook, 33 id., 551.
Shafer vs. Whelpley, 37 id., 334.

WILLIAM F. VILAS,
Of Counsel for Appellants.

Office Supreme Court, U. S.
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DEC 13 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

D. E. ROBERTS AND J. F. ELLIS, Appellants,
vs.
THE NORTHERN PACIFIC RAILROAD CO.
No. 124.

Brief for Appellee.

This was an equitable action to quiet title, begun by appellee against appellants in the Circuit Court of the United States for the Western District of Wisconsin. In the bill, it was alleged, that the board of supervisors of Douglass County proposed to convey to appellee, certain real estate upon condition, that the appellee would construct and operate a certain line of its road through a certain part of said county, and would accept the proposition within sixty days: (Rec., 1 and 2.)

That appellee desired, and was granted longer time in which to accept the proposition, and after due consideration the same was accepted. (Rec., 3, 4, 5.) That accordingly the board of supervisors released and conveyed, upon the consideration aforesaid, that of running its road through certain parts of Wisconsin and greatly influencing the prosperity of said county, to appellee certain real estate situated in the county aforesaid: (Rec., 6, 7, 8, 9, 10, 11, 12.)

That appellee also claimed title to said lands under and by virtue of certain tax deeds. (Rec., 13, 14.) That by reason of the construction and operation of appellee's line of road into Douglass County, the real estate aforementioned and all other real estate in the county greatly appreciated in value, and vast improvements were made. (Rec., 15.) That the legislature of Wisconsin, by act of 1883, chapter 150, approved and ratified the act of Douglass County in so contracting with appellee, and in conveying the lands mentioned to the same, and declared the same to be valid and effectual to vest in appellee the title to said lands. (Rec., 15.) That appellee sold in good faith to divers persons a large number of the parcels of land as conveyed to it. (Rec., 15.) That appellants combined with certain persons to injure appellee and claim its title to the land aforementioned, and did induce, on July 6, 1888, the board of supervisors of Douglass County to sell to appellant, Roberts, for a small sum, a certain part of the real estate aforementioned for a nominal sum of money. (Rec., 16.) That Roberts thereupon sold to appellant, Ellis, a part of the land he had acquired from the county: (Rec., 17.)

Whereupon appellee prayed a decree quieting title to all the lands in dispute in itself, and barring appellants and all persons claiming under them from claiming any right or title to the said land. (Rec., 17–18.) Appellants appeared and demurred to the bill and the demurrers were overruled. (Rec., 21–26.) Thereupon appellants answered the bill, and admitted the contract between appellee and the board of supervisors of Douglass County, but question the power of the board to enter into such a contract, and otherwise answering the bill. (Rec., 27–32.) After hearing upon bill and answer a decree was entered in favor of appellee, according to the prayer in its bill (Rec., 33–36), and from this decree appellants appealed to this court (Rec., 37.) On pages 37–38–39 of the Record

is found a supplemental answer of appellant, which it was stipulated might be put in as was offered to be filed in the court below. In this answer it is said that in a case before the Supreme Court of Wisconsin, in which the same questions as are here presented are involved, between the same parties, the court decided adversely to the appellee on all the points presented, and appellants pleaded such judgment as a bar to further litigation by the appellee upon the same questions—that the same had become as to complainants *res judicata*. Before discussing the merits of the case, we desire to argue the question as to whether this decree of the State Supreme Court can be of any effect as a bar to the complainant's rights to litigate the questions herein involved—are these questions thereby rendered *res judicata?* The case of Anderson *v.* Santa Anna, 116 U. S., 356, we think fully determines this question.

In this case, following the decision of Burgess *v.* Seligman, 107 U. S., 20, the court says: "It is the settled doctrine of this court, that rights accruing under one construction will not be lost merely by a change of opinion in the State court; and where such rights have accrued, before the State court has announced its construction, the Federal court, although leaning to an agreement with the State court, must determine the question upon their own independent judgment."

So in this case, these rights of the appellee had accrued before the State court had decided the questions involved here, and it is clear this whole matter is not only open to adjudication by this court, but the court is not bound to follow the decision of the State court at all.

In no sense could this suit in the State court be considered as *res adjudicata* here; as this suit is for all the lands and that was for but a portion, and all the parties are brought into this suit, and only a portion of them in that. (Cooley Const. L., 62–63, notes 1 and 2 to page 63, 6th edn.)

But further, this suit was between all parties claimants, to prevent a multiplicity of suits, and to settle the whole controversy, and the State suit was not, and the point presented that appellee was not in possession and could not, therefore, bring this suit, is not sound in law or in fact.

On page 14 of the Record appellee alleges possession of much of this land, and it is admitted by appellants (Rec., 28), and the authorities are not divided, that a party claiming under conveyances, but having possession of only a part of the land, can bring his bill to quiet his title to all, to remove clouds from it and enjoin any further litigation. (Adams Eq. (7th Am. ed.), 199, and notes; *Ib.*, 202 and notes.)

Shell *v.* Martin, 19 Arks., 139; Walker *v.* Peay, 22 *Ib.*, 103: Many more questions are evidently in issue here than were in the State case. Even more, no State laws or State decisions can restrict or hinder and delay the exercise of the equity jurisdiction of the United States courts.

Scott *v.* Neely, 140 U. S., 106;
Payne *v.* Hook, 7 Wall., 425;
Thompson *v.* R. R. Co., 6 *Ib.*, 134;
Bennett *v.* Butterworth, 11 How., 669.

It would be a curious position to assume, that the appellee is estopped by the State case, which he could not contest here, as no Federal question arose (144 U. S., 458), to prosecute this case which is brought within Federal jurisdiction, and asks for all questions and rights to be determined and to end all litigation about this entire transaction. It presents, therefore, no question of comity of jurisdiction, or duels in courts over jurisdiction, or the the respect due from the one or the other tribunal to their respective decisions. They are different cases, with more

parties in this and more questions and rights to dispose of than were in the State case.

But, in fact, as shown by the Record, this point attempted to be presented by appellants was not before the court below—was not considered or passed upon—but as counsel insisted the supplemental answer was with the papers in the case, it was stipulated it might be with the Record in this Court, as if it was originally incorporated therein (Rec., 40), but no more than this, as the court below did *not allow this supplemental answer*—that is, we suppose, not allowed to be filed, as this was over three months after the case was heard on bill and answer. There is obviously one main or leading question to be determined here on the merits: "Was it within the power of the board of supervisors of Douglass County to make this contract with the Northern Pacific Railroad Company?" We contend that, in the language of the court below (Rec., 36), the proposition made by the board of supervisors of the county of Douglass to said complainant (Northern Pacific R. R. Co.), and its acceptance by said complainant, constituted a legal and valid contract between the parties thereto, and authorized and empowered the said board of supervisors to grant and convey to said complainant the aforesaid lands and premises, in manner and form as stated in said bill of complaint."

The first question is, naturally, What are the powers of boards of supervisors of counties? And it is to be noted here that boards of supervisors and county commissioners are substantially the same in respect to their general functions and powers. In an enlarged general sense, such a corporation may be called the guardian of the county, having management and control of its financial interests, and having authority to do whatever the county as a political entity might do.

Shanklin *v.* Madison Co., 21 Ohio St., 575.

The board of supervisors is made, by law, the instrumentality of the county, and can make such order covering corporate property of the county as they deem expedient.

Hawkins *v.* Carroll Co., 50 Miss., 735;
Van Kirk *v.* Clark, 16 S. & R. (Pa.), 289;
Ib., 505.

And this is especially so in the State of Wisconsin.

La Pointe Supervisors *v.* O'Malley, 47 Wis., 332;
Perry *v.* State, 9th *Ib.*, 19;
Secs. 653–669, 1 San. & Berry. An. Stat. (Wis.)

Supervisors are trustees of the property interests of their counties, standing in the same position as an ordinary trustee to his *cestui que trust.*

Andrews v. Pratt, 44 Cal., 430.

From all this, then, it is at once obvious that counties act, in all matters pertaining to their interests, by and through their board of supervisors or commissioners, and really in no other way. If, then, a trustee has power to use the property of his *cestui que trust* for the latter's good and profit, why could not the board of supervisors of the county of Douglass use the property of the latter for its own good—to increase the value of property in the county.

Boards of supervisors of a county, being corporations, have no powers except such as are given them by statute, or which are necessarily implied. This is an undisputed principle; and the contention of appellants below was, and is now, that the making of this contract by the board of supervisors was not authorized by statute. Admitting that in the statute creating the office of board of supervisors in this instance, there was no express power given the board to make a contract, such as was made with appellee company, the legislature of Wisconsin after-

wards passed a law ratifying and confirming that contract and declaring appellee company to be the legal owner of the lands sued for herein.

The Laws of Wisconsin, 1883, ch. 150.

But outside of this confirmation by the legislature the law of Wisconsin, as expounded in 47th Wis., *sup.*, would seem broad enough of itself to give this very power.

But this act, passed subsequent to the making of the contract by the board, had the effect of making that contract lawful and binding, even if the original power in the board was doubtful. We contend it did, and that the act of 1883 was of the same effect and force as if it had been part of the act giving to the board its powers.

In the case of Anderson *v.* Santa Anna (116 U. S., 356) it is held, following the decisions in other cases cited therein, that "since what was done in this case by the board of supervisors of the county, would have been legal and binding upon the county had it been done under legislative authority previously conferred, it is not perceived why subsequent legislative ratification is not, in absence of constitutional restrictions upon such legislation, equivalent to original authority." But, say appellants, we claim there was a constitutional restriction upon this very retrospective legislation.

Let us see: if there was really such restriction, then they are right, this subsequent act is void; but, if in the Constitution of Wisconsin there is no restriction of this kind, then we contend, under settled law, it is in the power of legislatures to confer upon municipal corporations the right to aid in the constructing and running railroads in and through them, just as did the board of Douglass County, and the appellee in this instance. The board of supervisors merely sold or conveyed for valid consideration to appellee certain alienable lands—lands which they had the power to convey.

Municipal corporations possess the incidental or implied right to alienate or dispose of the property, real or personal, of the corporation of a private nature, unless restrained by charter or statute.

Dillon Mun. Cor., sec. 445;
15 Am. Eng. Ency. L., 1063 and note I.

Conveyances of real estate by municipal corporations should in general be executed in the corporate name and under the corporate seal.

Dillon Mun. Cor., sec. 450.

These requirements were fulfilled to the letter in this case. And it being in the power of the legislature to give to municipal corporations the right to alienate certain property under certain conditions, we argue that the act of 1883 of Wisconsin, retrospective in its nature, operated to give the county of Douglass, through its supervisors, the right to sell these lands to appellee, if even the supervisors had not the right at first, which we insist they had.

All we have said heretofore goes to establish that municipal corporations can dispose of their alienable property when empowered so to do by the legislature, and that this board had the power to make this contract; and the case of Santa Anna (116 U. S., *sup.*) settles the law that a statute passed subsequent to the act of conveyance makes that act of legal force and effect anyhow. The point presented by appellants, and with apparent seriousness insisted on, that the board of supervisors in July, 1888, undid the work of its predecessors of some six years before that, and sold the lots, etc., to Roberts, is of no value. This board in 1888 had no right to pass upon and set aside the judgment of their predecessors; "the idea that they could do so is not to be tolerated."

Supervisors *v.* Birdsall (4th Wend., 460).

This comes under the rule of finality to all matters passed upon by special tribunals for which no appeal is provided.

Freeman Judgt., Sec. 524;
Brown Jurisd., Sec. 23;
Williams *v.* Supervisors (122 U. S., 154), approving Stanley *v.* Supervisors (121 U. S., 535).

The same principle is strikingly applied in Noble *v.* Union River, etc. (147 U. S., 165), where this court held, that Secretary Noble could not undo and cancel some of the good work of Mr. Vilas, his predecessor in office.

Before, however, the futile act of the board in 1888, the legislature affirmed the work of the board done in 1882, by a curative act of 1883, if there were any flaws or defects in this work, and we believe we have seen there were none.

There is no question the legislature, having the disposal of the public domain, could have done this act itself, and having that power it could ratify what the Board did; indeed, this was disposition by the legislature.

Barrett *v.* Brooks (21 Iowa, 149);
Schulenberg *v.* Harriman (21 Wall., 44);
Supervisors *v.* State (31 Ill., 68–78–9);
Newell *v.* Supervisors (37 *Ib.*, 253).

And, generally, it was one of those curative acts the legislature was fully competent to pass, as we have seen above. (116 U. S. *sup.;* but, in addition, see Cooley Cons. L., 457–60, 469.)

This is, at best, a question of policy and not of constitutional power. (*Cooley, supra, 460.*) Doubtless the act of the legislature in approving this transaction was retrospective, but not for this was it nugatory. In nearly all the States these retrospective laws may be passed if they interfere not with rights vested. (*Cooley, sup., 110–115.*)

Some of the States prohibit absolutely, in their constitutions, the enactment of all retrospective laws (Missouri, New Hampshire, Tennessee, and Texas). Wisconsin does not have this in her constitution, but she stands as the other States do, permitting their passage, so far as they touch not the rights of others. (*Cooley, sup., 455, note 3.*)

Here no intervening rights were affected at all, and, so far as Roberts and Ellis are concerned, it was done five years before they stepped upon the scene of action, or were heard of at all in this affair.

And thus appellee appears to be doubly justified in its right here. Appellee relies upon limitation under his tax deeds (Rec., 14), and to this we have seen no response to overthrow it. The language of the statute is plain and unambiguous, and has no exception to affect this case.

Ch. 138, Laws of Wisconsin, 1861, sec. 5;
Rev. S. Wis., 1878, secs. 1188 and 1210 d.

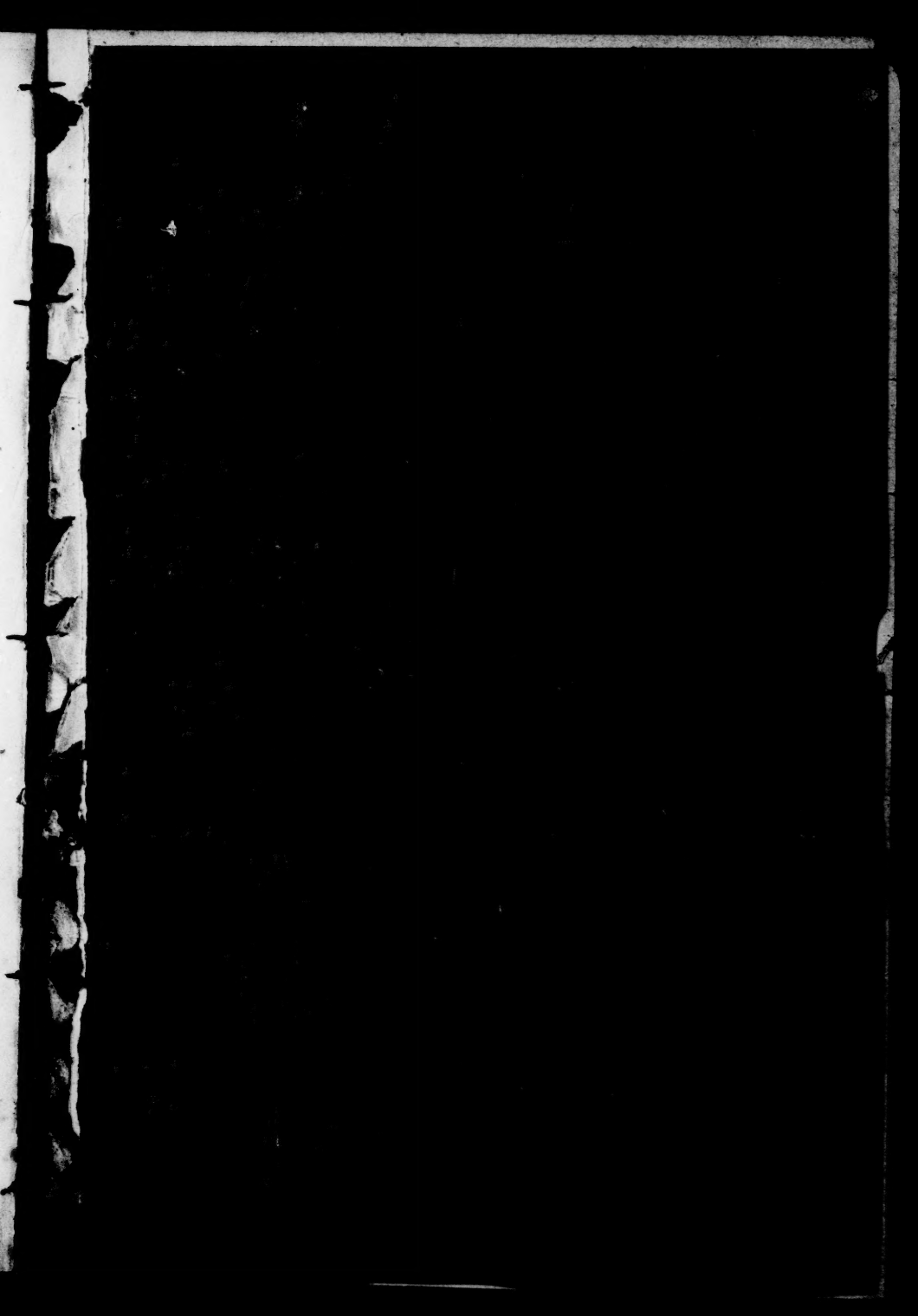
These statutes, prescribing the time in which to bring suits to impeach such deeds, are statutes of repose, founded on sound policy, and should meet with favor by the courts.

Roberts *v.* Pillow (Hemp., Cir. Ct., 624);
S. C., 13 How., 472;
2d Blackw., Tax Tit., Sec. 901 *et seq.*

The court will observe, there is no assignment of errors filed in this case in compliance with section 997, Rev. S., or with secs. 2 and 4 of Rule 21 of this court. Nor is there any assignment that meets with the requirements of Rule 35 of this court, as far as this rule may apply; and, therefore, we ask a dismissal of the appeal.

Respectfully,

JAMES MCNAUGHT and
A. H. GARLAND,
For Appellee.



IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1894.

No. 124.

D. E. ROBERTS AND J. F. ELLIS,
Appellants,

vs.

NORTHERN PACIFIC RAILROAD COMPANY,
Appellee.

Appeal from the United States Circuit Court for the Western District of Wisconsin.

STATEMENT OF FACTS.

This action was brought by the Northern Pacific Railroad Company, the appellee herein, to quiet its title to certain town lots and lands in the county of Douglas, state of Wisconsin, which had been deeded to it by said county.

The Northern Pacific Railroad Company is a corporation organized and existing under and by virtue of an act

of congress, approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route," and the various acts and joint resolutions of congress supplemental thereto and amendatory thereof. It was, by said act, authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior, in the state of Minnesota or Wisconsin, thence westerly by the most eligible railroad route, to be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude, to some point on Puget Sound; and was vested with the powers, privileges and immunities necessary to carry into effect the purposes of its said granting act. And it was expressly provided in said charter, as follows:

"That the said company is authorized to accept to its own use any grant, donation, power, franchise, aid or assistance which may be granted to or conferred upon said company by the congress of the United States, by the legislature of any state, or by any corporation, person, or persons; and said corporation is authorized to hold and enjoy any such grant, donation, loan, power, franchise, aid or assistnace, to its own use for the purpose aforesaid."

By an act of the legislature of the state of Wisconsin, approved April 10, 1865, appellee was, for the purposes set forth in said act of congress and to carry the same into full effect, vested with all the rights, powers privileges and immunities within the limits of said state of Wisconsin, which were given by said act of congress within the territorial jurisdiction of the United States. On or about September 7, 1880, the appellee, having theretofore constructed its railroad and telegraph line to a point in the state of Minnesota known as N. P. Junction, and being about to hold a meeting of its board of directors to con-

sider the extension of said line eastward from said junction to some point on Lake Superior, the board of supervisors of Douglas county, Wisconsin, at a meeting duly held, passed and caused to be entered in the record of the proceedings of said county board a resolution in substance providing that the Northern Pacific Railroad Company was about to hold a meeting of its directors to consider the subject of an early extension of its main line from N. P. Junction eastward through Wisconsin, and that the prosperity of Douglas county would be greatly influenced by the manner in which and the route upon which the road should be extended through the county; and it was therefore resolved that in the opinion of said board a line of road entering the state at some point between the St. Louis and Nemadji rivers, thence to a point on the Bay of Superior at or near the mouth of the Nemadji, and thence along said Bay to Connor's Point, with sufficient docks or piers suitable for the transfer of passengers and freight from its cars to lake-going craft, and *vice versa*, and from thence an eastward extension, would be the best and most profitable route for the railroad business, and best develop the county of Douglas and its resources.

It was further resolved that it was the duty and true policy of the board by every means in its power to promote the construction of such railroad upon such route, and that in behalf of Douglas county, in aid of or inducement to the construction of said railroad, said board offered to said company that upon condition that it should accept this proposal, and construct its railroad within the year 1881 as above indicated, said county would transfer by sufficient deed or deeds, to the railroad company all the alienable lands or lots belonging to the county which had been acquired by deed, to which the county had held undisputed title during two years previous to the passage of such resolution; and the county further offered, in order to enable all persons interested in the county to offer liberal contributions in aid of the

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road, to join in conveyances to the railroad company by such interested persons of whatever lands said persons may contribute in aid of the railroad, so that such contribution might be made without lien, and free from all county incumbrance; and would co-operate in the most liberal manner consistent with law with all persons desirous of aiding the enterprise, so important in the development of the county. P. Rec. 1–3.

Afterwards, and on November 12, 1880, the county board duly extended the time for the acceptance by the railroad company of the foregoing proposition to December 18, 1880. P. Rec. 3–4.

On December 16, 1880, the railroad company duly accepted the proposition. P. Rec. 4–5.

Afterwards, and on July 20, 1881, the county board of supervisors of Douglas county passed a resolution extending the time for the completion by said railroad company of a portion of its said railroad till December 31, 1882.

Pursuant to said proposition and the acceptance thereof by the railroad company, and the contract so entered into between the railroad company and the county, the railroad company, during the year 1881, constructed, completed and equipped its line of railroad from Northern Pacific Junction, entering the state of Wisconsin and running therein as provided in the resolution of the county board, and fully performed all the conditions of said contract on its part to be performed, expending in the construction of said railroad and the performance of such conditions the sum of $740,000; and the company has since maintained and operated the same.

On January 16, 1882, the county board authorized the conveyance to the railroad company of the lands and lots agreed to be conveyed to it, and by resolution, on that day adopted, recited that the railroad company had complied with the terms of the resolution and agreement, and performed its part thereof, and had requested the execution

of the deeds provided for therein. P. Rec. 6–8. Thereupon a deed, dated Jauuary 20, 1882, was made by Douglas county to the railroad company of the lots and lands in suit, and other lots and lands, said deed being in the usual form, and reciting the resolutions and proceedings above mentioned, and the performance by the railroad company of its part of the agreement. P. Rec. 8–9.

On the same day the deed was duly recorded in the office of the register of deeds of Douglas county. The title of the county of Douglas to these lands was derived as follows:

(1) A certain tax deed issuing from the state of Wisconsin and Douglas county as grantors to the said Douglas county as grantee, bearing date the 16th day of May, A. D. 1874, and recorded in the office of register of deeds for the said Douglas county of the 18th day of May, A. D. 1874, in Book I, of Tax Deeds, on page 568 *et seq.* P. Rec. 13.

(2) A certain other tax deed issuing from the state of Wisconsin and Douglas county as grantors to the said Douglas county as grantee, bearing date the 30th day of May, 1877, and recorded in the office of the register of deeds for said Douglas county on the 30th day of May, A. D. 1877, in Book I, of Tax Deeds, on page 616. P. Rec. 13.

(3) A certain other tax deed issuing from the state of Wisconsin and Douglas county as grantors to the said Douglas county as grantee, bearing date the 30th day of May, A. D. 1877, and recorded in the office of the register of deeds for said Douglas county on the 30th day of May, A. D. 1877, in Book I of Tax Deeds, on page 618. P. Rec. 13.

(4) A certain other tax deed issuing from the state of Wisconsin and Douglas county as grantors to the said Douglas county as grantee, bearing date the 6th day of August, 1877, and recorded in the office of the register of deeds for said Douglas county on the 8th day of August,

1877, in Book 3 of Tax Deeds on page 1. P. Rec. 13, 14.

Each of these tax deeds is regular and fair upon its face, and each was made, executed and acknowledged in due form as prescribed by the laws of the state of Wisconsin, and had been of record for more than three years prior to the conveyance to said appellee.

The complainant in its bill pleads and relies upon the statute of limitations of the state of Wisconsin, limiting the time for bringing actions to avoid tax deeds, or to impeach or invalidate the same, particularly relying upon section 5, chapter 138, of the laws of 1861, and sections 1188, 1210*d* of the Annotated Statutes, and the acts amendatory thereof. P. Rec. 14.

By chapter 150 of the laws of Wisconsin for 1883, being an act entitled, "An act to enable the Northern Pacific Railroad company to perfect title to lands in Douglas county," approved March 23, 1883, the legislature of the state of Wisconsin enacted and provided as follows:

"Sec. 1. Any conveyance heretofore made by the county of Douglas to the Northern Pacific Railroad, under and in pursuance and satisfaction of resolutions of the county board of said county, dated September 7, 1880, is hereby declared to be valid and effectual to vest in the Northern Pacific Railroad Company, the title to the lands conveyed or attempted to be conveyed by such conveyance; and any assignment of tax certificates heretofore made to the said railroad company, upon the property, or any thereof, embraced in and conveyed by said conveyance, pursuant to and in satisfaction of, and in compliance with said resolutions, is hereby declared to be valid.

"Sec. 2. This act shall be favorably construed to render effectual the said conveyance and assignment, and shall take effect from and after its passage and publication." P. Rec. 15.

The appellee, the railroad company, has been at all times since the execution of said deeds, in the possession of its road-bed upon sixteen lots and ten blocks, parcel

of the lands so deeded, having constructed its railroad thereover in the year 1881, and having since that time used the same for the purpose of maintaining and operating its railroad, and said parcels were at the commencement of the suit worth more than ten thousand dollars, and the possession, use and occupancy thereof are indispensible to the maintenance and operation of the railroad. P. Rec. 14.

As to the remainder of said lands, they were at the time of the execution of such deeds, and ever since have been, vacant and unoccupied, and, except for such possession as the law vested in the appellee and its grantor, Douglas county, not in the possession of any one. Since the execution to it of the deed by the county of Douglas, as hereinbefore set forth, and until the month of July, 1888, the appellee's title to these lands was unquestioned, and it, from time to time, in good faith, sold and conveyed to divers and sundry persons, large numbers of the parcels of land so conveyed to it (not, however, including the lands in suit), and the titles so conveyed are now held by innocent purchasers for value. July 6, 1888, the defendant Roberts, applied to the board of supervisors of Douglas county to purchase, by the payment of the amount of the delinquent taxes, penalties, etc., the lots and lands which had been theretofore deeded to the appellee, and on said July 6, 1888, the county clerk of said county, pursuant to a resolution of said board, made, executed and delivered to said defendant, Roberts, a certain deed for the greater portion of said lands, purporting to convey the same to said Roberts, in consideration of the sum of $335.00, which was the amount paid by said Roberts. There were omitted therefrom, however, several of the parcels of land which had theretofore been conveyed to the appellee, and which it was the intention to include therein, and to include said omitted parcels a second deed was issued by the clerk to the defendant Roberts, bearing date

March 7, 1889. The consideration for this second deed to the defendant, Roberts was $50.00. These two deeds purport to convey all the lands here in controversy. P. Rec. 16. The defendant, Roberts, also claims to have title to certain of these pieces and parcels of land by virtue of a tax deed, bearing date July 12, 1888, and recorded in the office of the register of deeds July 17, 1888, in Book 3 of Tax Deeds, on page 343, said tax deed being issued upon certain tax certificates issued to the county of Douglas upon the tax sale of the year 1877 for the year 1876. These certificates were held by the county at the time when it issued its deed conveying the lands and premises to the appellee. The other appellant, J. F. Ellis, claims title to a part of the lands in controversy by virtue of a quitclaim deed from Roberts, made in April, 1889.

To the bill setting up these facts the defendants demurred separately, on the ground of misjoiner of parties defendant, and upon the further ground that the bill was without equity. The demurrer having been overruled (see opinion of court in 42 Fed. Rep., 734) the defendants answered jointly. The answer admits the facts as heretofore stated, but sets up that the board of supervisors had no power or authority to convey or order to be conveyed any lands or lots except upon receiving adequate consideration in money therefor; and denies that any act of the supervisors or of the clerk, or that chapter 150 of the laws of Wisconsin for 1883, could, under the laws and constitution of the state of Wisconsin, have the effect of conveying lands or vesting the title thereto in the appellee. It also alleges the pendency of an action brought by the defendant, Ellis, against the Northern Pacific Railroad Company to quiet title to a portion of the lands which had been conveyed by the county to this appellee and afterward to the appellant, Roberts, and by the latter to the appellant Ellis, but which are not included in this suit; said action being pending and undetermined before the supreme court of the state of Wisconsin, and, as alleged, in-

volving the same and every question that is involved in this action, and charging that this action, is brought especially to avoid and evade the judgment and determination of said court in respect to said question of title to said lands. P. Rec. 27, 28. Complainant having set the cause down for hearing on the bill and answer, a final decree in its favor was entered March 7, 1891. From this decree the appellants sued out the present appeal.

After hearing on the said bill and answer, to-wit: in February, 1891, the appellants appear to have offered to the clerk for filing a certain supplemental answer, setting up that May 20, 1890, six months prior to the date of the hearing, but after the decision of the circuit court on the demurrer and pleas, the supreme court of the state of Wisconsin entered a judgment in the case hereinbefore referred to, wherein J. F. Ellis was complainant and the Northern Pacific Railroad Company was defendant, and that the supreme court of the state of Wisconsin, in and by such judgment determined and decided the validity and legal effect of the deed from Douglas county to the Northern Pacific Railroad Company, and also decided as to the power of said county board of supervisors to grant said lands to said company at the time, in the manner, upon the terms, and for the consideration stated in complainant's bill in this cause, and also the legal effect of chapter 150 of the laws of Minnesota for the year 1883; holding and deciding that the said deed from the county of Douglas was void and conveyed no title, and that neither the county of Douglas nor its board of supervisors acting for it, had authority or power, under the laws of the state of Wisconsin, to donate or grant the lands described in the deed, or any of them, to said railroad company, upon the consideration expressed in the bill of complaint; and also holding that said chapter 150 of the laws of Wisconsin for 1883 was invalid, and did not have the effect of confirming the title in the railroad company. And in said supplemental answer said defendants at-

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tempt to urge and plead such judgment of the supreme court of the state of Wisconsin in bar of the right of the complainant to again litigate or review in any manner in the Federal courts any of the points or questions decided by the state court, and urge that as to said complainant such questions became, by such judgment, *res judicata*. This supplemental answer was not allowed and is not properly in the case, but by stipulation between the parties it was agreed that the same may be filed in the supreme court and printed as a part of the record, as if originally printed therewith. P. Rec., 40.

POINT I.

The Bill is not Multifarious.

Ellis *v.* N. P. R. R. Co., (Wis.), 45 N. W. Rep., 811, 812.
C. P. R. R. Co. *v.* Dyer, 1 Saw., 650.
DeForrest *v.* Thompson, 40 Fed. Rep., 377-8.
U. S. *v.* Curtner, 26 Fed. Rep., 298.
Gains *v.* Chew et al., 2 How., 643.
Sliver *v.* Pratt, 3 How., 411.
Crews *v.* Burnham, 1 Black, 352.
Osburne *v.* Wis. Cen. R. R. Co., 42 Fed. Rep., 826.
Board of Supervisors *v.* Deyoe, 77 N. Y., 219.

POINT II.

The deed purporting to convey the lands in controversy to the appellee is sufficient to convey such lands if the legislature had power to authorize such conveyance.

The title of appellee's grantor, Douglas county, is derived from tax deeds issued from the state of Wisconsin and Douglas county as grantors to Douglas county as

grantee; the first of such deeds being issued May 16, 1874, and the last August 6, 1877.

The parties to this case claim under a common source of title; Douglas county obtained four tax deeds of the lands in question among others, prior to the conveyance to the railroad company, and the statutes of limitation had run on all of these deeds at the time of such conveyance.

It is not deemed necessary, therefore, to show the power of the county to take these tax deeds. If any question should arise on this point the following citations put its power, as well as its title, beyond question:

R. S. 1878, annotated edition, secs. 1176, 1194, 1188, 1210*b*, 653, 669, and cases in notes.
Bemis *v.* Weege, 67 Wis., 435.
Semple *v.* Wharton, 68 Wis., 626.

The right of the county to convey is shown as follows: Section 669 of Sanborn & Berryman's Annotated Statutes provides, among other things, as follows:

"The county board of each county shall have the power at any legal meeting:

"1. To make such orders concerning the corporate property of the county as they may deem expedient.

"6. To represent the county, and have the care of the county property, and the management of the business and concerns of the county in all cases, when no other provision shall be made.

"11. To perform all other acts and duties which may be authorized or required by law."

Sec. 650, of the same statute gives counties power to hold and convey real estate, for public uses. Sec. 653 provides that the county board may by resolution or ordinance direct the county clerk to sell and convey any real estate of the county, not donated and required to be held for a special purpose.

We submit that this broad and sweeping authority to

take such action with reference to the corporate property of the county, including, of course, lands to which the county had acquired title by its purchase at tax sales, is sufficiently broad to authorize the donation of such lands to secure the construction of a railroad, if in the judgment of the county board such action is deemed expedient. But it is unnecessary to discuss this point, for conceding that the statute was not sufficiently broad to authorize the action taken by the county board of supervisors in donating these lands, and that at the time the donation was attempted to be made it was defective for lack of authority in the board, yet that defect is cured by chapter 150 of the laws of Wisconsin for the year 1883, declaring that the conveyance shall be valid and effective and vest in the railroad company the title to the lands conveyed or attempted to be conveyed by such conveyance. That the legislature can, by subsequent legislative enactment and ratification make that action legal which was originally defective for want of legal sanction, whenever it could have authorized the action in the first instance, must now be considered as settled, where the state constitution does not prohibit such retroactive legislation, and in the state of Wisconsin this doctrine has received the approval of the state supreme court.

Ellis *v.* N. P. R. R. Co. (Wis.), 45 N. W. Rep., 811, 813.
Cooley's Const. Lim., p. 456 *et seq*, (5th ed.).
Bolles *v.* Brimfield, 120 U. S., 759, 762–3.
Anderson *v.* Santa Anna, 116 U. S., 356, 363–4.
Granada Co. *v.* Brogden, 112 U. S., 261, 270 *et seq.*
Thompson *v.* Perrin, 103 U. S., 806, 815.
Ritchie *v.* Franklin, 22 Wall., 67.
Campbell *v.* City of Kenosha, 5 Wall., 194.

If, therefore, the legislature of the state of Wisconsin could have authorized the conveyance of the lands in controversy to the appellee, it will be held that the deed of

the county, ratified by the legislature, is effective for that purpose. The appellants, however, insist that it was beyond the power of the legislature to authorize the county board to donate its lands or money to a railroad, and that it could not by subsequent act cure a thing which it could not originally authorize to be done. That the legislature could not, by retroactive legislation validate an act which it could not authorize, cannot be questioned. We submit, however, that the legislature could have authorized such action.

POINT III.

The grant of aid in the construction of a railroad is such a public purpose as will support the exercise of the power of taxation.

It is assumed by the appellants that the donation of lands held by the county under tax deeds duly issued, made to aid in the construction of a railroad, is governed by the same principles as would govern the levy of a tax for the purpose of enabling a municipalty to make a donation for such purpose, and that if the making of such donation is not such a public purpose as would support the exercise of the power of taxation, the present deeds are unauthorized and void, and we may concede this to be so. We also concede that taxes can be levied for pub lic purposes only. Making these concessions the question to be discussed is narrowed down to this one proposition: Is or is not the construction of a railroad such a public purpose as will support the exercise of the power of taxation? This question has so often been answered in the affirmative by this and other courts that it is impracticable to attempt to cite all the decisions. We cite a large number, and this list, however exhausting is not exhaustive.

Gelpcke *v.* Dubuque, 1 Wall., 175.

Rogers *v.* Burlington, 3 Wall., 327, 330.

Thompson *v.* Lee County, 3 Wall., 327, 330.
Mitchell *v.* Burlington, 4 Wall., 270, 273–4.
St. Joseph Townsite *v.* Rogers, 16 Wall., 644, 662.
Railroad Co. *v.* County of Otoe, 16 Wall., 667, 673, *et seq.*
Olcott *v.* Supervisors, 16 Wall., 678, 694, *et ser.*
Townsite of Pine Grove *v.* Talcott, 19 Wall., 666, 676.
Town of Queensbury *v.* Culver, 19 Wall., 83, 90.
Townsite of Burlington *v.* Beasley, 94 U. S., 310, 313.
Taylor *v.* Ypsilanti, 105 U. S., 60.
Young *v.* Clarendon Town, 132 U. S., 346, 356.
N. P. R. R. Co. *v.* Roberts, 42 Fed. Rep. 734, 736.
Perry *v.* Keen, 56 N. H., 514, 531 *et seq.*
Town *v.* Bennington *v.* Park, 50 Vt., 178, 192 *et seq.*
Leavenworth *v.* Miller, 7 Kas., 120, 155–6.
Hallenbeck *v.* Hahn, 2 Neb., 377, 401 *et seq.*
Bank of Rome *v.* Village of Rome, 18 N. Y., 38, 43–4.
S. & V. R. R. Co. *v.* City of Stockton, 41 Cal., 147, 168 *et seq.*
Inhabitants of Worcester *v.* Western R. R. Co., 4 Metc., 564, 565.
Newburgport Turnpike Co. *v.* R. R. Co., 23 Pick., 326, 327.
Doddin *v.* Crump. 8 Leigh, 120, 15566.
McClenacham *v.* Curwin, 3 Yeates, 362, 373.
Sharpless *v.* Mayor, 21 Pa. St., 147, 169, *et seq.*
Gibson *v.* Mason, 5 Nev., 281, 307.
Nichols *v.* Mayor, 9 Hump. (Tenn.), 251, 268, *et seq.*
L. & N. R. R. Co. *v.* County Court, 1 Sneed (Tenn.), 635, 662–7.
Caldwell *v.* Justices, 4 Jones Eq. (N. C.), 323, 324.
N. O. &c. R, R. Co. *v.* McDonald, 54 Miss., 240, 245.
Talbot *v.* Dent, 9 B. Mon., 526, 535.
Stein *v.* Mayor of Mobile, 24 Ala., 595, 614.
Augusta Bank *v.* Augusta, 49 Me., 507, 415.

Aurora v. West, 9 Ind., 539, 540, *et seq.*
C. W. & Z. R. R. Co. *v.* Commissioners, 1 Ohio St., 77, 94, *et seq.*
Commissioners *v.* Nichols, 14 Ohio St., 260, 266.
C. D. & V. R. R. Co., 622 Ill., 268, 276, *et seq.*
Harcourt *v.* Good, 39 Tex., 456, 470, *et seq.*, and cases cited from 26 states.
Cotton *v.* County Commissioners, 6 Fla., 610, 622, *et seq.*
Copes *v.* Charleston, 10 Rich. (S. C.), 491, 501, *et seq.*
Police Jury v. McDonough, 8 La. An., 341, 353, *et seq.*
State *v.* Linn Co. Court, 44 Mo., 504, 511.
Goshorn *v.* Supervisors, 1 W. Va., 308.
Davidson v. Ramsey Co., 18 Minn., 432, 436, *et seq.*
Stewart *v.* Board of Supervisors, 30 Iowa, 9, 19, *et seq.*

In view of these decisions it would be an idle task to attempt to argue the proposition involved, as a question of principle. Many of these authorities, however, refer to cases of subscription to stock of a railroad corporation, and the appellants may insist upon a distinction between such subscription and an absolute donation, and in the case of Whiting *v.* Sheboygan & Fond du Lac Railroad Company, 25 Wis., 167, 209, the supreme court of Wisconsin attempts, by means of such distinction, to reconcile its decision that a tax levied for the purpose of making a donation to a railroad company is unconstitutional, with its prior decision in support of subscriptions to the stock of such railroad company. It is obvious, however, that this is a distinction without a difference. Clearly the state cannot engage in a private business, nor levy taxes for the purpose of becoming a partner therein, and the partnership of a state in an industry which is in its nature essentially private, will not support the exercise of the power of taxation. If the use is not a public use the state can no more become a stockholder in a railroad company than it can become a stockholder in a brewery; and if the use

is a public use, such as will justify the state in entering into the enterprise, then it is not essential that the state should obtain an interest to justify its exercise of the power of taxation to and the enterprise. Every authority repudiates the distinction suggested in Whiting *v.* Railroad Company, *supra*. Says this court in Railroad Company *v.* Otoe County, 16 Wall., 667, 665:

"There is no solid ground of distinction between a subscription to stock and an appropriation of money or credit. Both are for the purpose of aiding in the construction of the road; both are aimed at the same object, securing a public advantage, obtaining a highway or an avenue to the markets of the country; both may be equally burdensome to the taxpayers of the county. The stock subscribed for may be worthless, and known to be so. That the legislature of the state might have granted aid directly to any railroad company by actual donation of money from its treasury will not be controverted."

And says the supreme court of Nebraska, referring to this case of Whiting *v.* Railroad Company, *supra*.

"The road subserves no greater end with county subscription to the stock than without it. This distinction has no leg of principle to stand upon, and is approved by no one, and is expressly repudiated by even those who maintain the invalidity of this kind of bond generally."

Hallenbeck *v.* Hahn, 2 Neb., 377, 420.

See also:

Olcott *v.* Supervisors, 16 Wall., 678, 697.
Town of Queensbury *v.* Culver, 19 Ball., 83, 90.
Township of Pine Grove *v.* Talcott, 19 Wall., 666.
New Buffalo *v.* Iron Co., 105 U. S., 73, 75.
N. O., etc., R. R. Co. *v.* McDonald, 53 Miss., 240, 245.
Talbot *v.* Dent, 9 B. Mon., 526, 532.
Perry *v.* Keene, 56 N. H., 514, 535-6.
Commissioners *v.* Nichols, 14 Oh. St., 260, 266.
C. D. & V. R. R. Co., 268, 277.
Davidson *v.* Ramsey county, 18 Minn., 432, 439.

And the supreme court of Wisconsin has itself prac-

tically conceded that the distinction attempted to be made by it in the Whiting case, *supra*, is an arbitrary one, without any foundation in principle. It says:

"It is a matter of regret that courts have sustained municipal subscriptions to the stock of railroad corporations, for it seems like a perversion of the object for which municipal governments are established, and the practice has often led to great mischief and oppression. But we can go no further than we have in sanctioning a bad principle. Whether or not there is solid ground for the distinction between the case of donating money or property to a railroad company or subscribing to its stock and paying in money or bonds, the distinction has been made, and we feel bound to abide by it."

Ellis *v.* N. P. R. R. Co., 45 N. W. Rep., 811, 813.

The court must, therefore, sustain the deed to appellee here in question, unless it is bound by the construction placed upon the term "public use" by the supreme court of Wisconsin.

POINT IV.

This court is not bound by the decision of the supreme court of Wisconsin, holding that a law authorizing a donation by a municipal corporation to aid in the construction of a railroad is unconstitutional.

Sec. 721 R. S., provides:

"The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

It is insisted by the appellants that under this provision the Federal courts are bound by the decision of the Wisconsin court that municipal donations to aid in the construction of a railroad are in conflict with the constitution of Wisconsin and therefore void. The fault of this argument is that it ignores the scope of the provision, and

overlooks the fact that the Wisconsin court decision is not based upon any interpretation or construction of the constitution of Wisconsin or state legislation. In Swift *v.* Tyson, 16 Pet., 1, the supreme court, referring to the 34th section of Judicary Act of 1789, chapter 20, being sec. 721 R. S., says:

"In the ordinary use of language, it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. In all the various cases, which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, nor at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes, and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true

interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence." P. 18.

And see:

Carpenter *v.* Providence Washington Ins. Co., 16 Pet., 495, 511.

The principles thus early laid down have been steadfastly followed, and it is now the established doctrine that while the federal courts will follow a settled interpretation of a state statute by the highest court of the state, where that statute does not infringe upon the federal constitution, yet upon questions of general law and jurisprudence, the federal courts will, while regarding with respect the decisions of the state courts, refuse to sacrifice their own judgment and blindly follow the state court decisions. Thus in Mercer County *v.* Hacket, 1 Wall., 83, the court held that bonds issued under an act of the assembly of the state of Pennsylvania, authorizing a subscription to the stock of a railroad company, were negotiable securities, refusing to follow the dicision of the supreme court of Pennsylvania announcing the contrary view. The court says, referring to the Pennsylvania court decision.

"If this decision of that learned court was founded on the construction of the constitution or statute law of the state, or the peculiar law of Pennsylvania as to titles to land, we would have felt bound to follow it. But we have often decided that on questions of mercantile or commercial law, or usages which are not peculiar to any place, we do not feel bound to yield our own judgment, especially if it be fortified by the decision of 'all other English and American courts.' These securities are not peculiar to Pennyslvania or governed by its statutes or peculiar law."

In Boyce *v.* Tabb, 18 Wall., 546, the supreme court

says, referring to the 34th section of the Judiciary Act of 1789:

"The provisions of that section do not apply, nor was it intended they should apply, to questions of a general nature not based on a local statute or usage, nor any rule or law affecting titles to land, nor on any principle which had become a settled rule of property. The decisions of the state courts, on all questions not thus affected, are not conclusive authority, although they are entitled to, and will receive from us, attention and respect." P. 648.

In Hough *v.* Railway Company, 100, U. S., 213, this court held that a master would not be held liable to a servant for the neglect of a fellow-servant, although a different doctrine had been held by the decision of the supreme court of Texas, the state within which the injury occurred, and where the suit was brought. Refusing to follow the state court doctrine it says:

"The questions before us, in the absence of statutory regulations by the state in which the the cause of action arose, depend upon principles of general law, and in their determination we are not required to follow the decisions of the state courts."

And see:

Railroad Company *v.* National Bank, 102 U. S., 14, 32.

Town of Venice *v.* Murdock, 92 U. S., 494, 501.

Myric *v.* Mich. Cent. R. R. Co., 107 U. S., 102, 109.

Railroad Co. *v.* Lockwood, 17 Wall., 357, 367–8.

This question whether or not a donation to aid in the construction of a railroad is such a public use as will justify the raising of funds by taxation for that purpose, as presented by the decisions of the supreme court of Wisconsin, is a question of general law, in the determination of which the federal courts will not blindly follow the state court, surrendering their own judgment and affirming as law what they have repeatedly denounced as with-

out foundation in reason or law. In none of the decisions of the supreme court of Wisconsin upon this subject has attention been called to any provision of the state constitution forbidding legislation of the class in question. It has never been intimated, as far as we know, that that instrument differed in respect to such provisions, from the constitutions of other states, or that it, more than the constitution of other states, forbade such legislation. The reasoning of the Wisconsin court in Whiting *v.* Sheboygan, etc., R. R. Co., 25 Wis., 167, which contains all that the court has to say upon the subject (all other decisions referring to that case as their authority), if resolved into its primary syllogistic form, is as follows:

Major premise: The power of taxation cannot be exercised for a private use.

Minor premise: A railroad owned and operated by a private corporation is a private enterprise.

Conclusion: The power of taxation cannot be exercised to obtain the means of aiding in the construction of such a railroad.

The major premise, involving the only constitutional provision in the syllogism, is conceded by all; and by none is it expressed in more clear and unmistakable terms than by those courts that sustain the right of a state to levy a tax to aid in the construction of railroads owned and operated by private corporations. And the difference between the Wisconsin and other courts is in the minor premise; every other court holding that the construction of a railroad is, from the nature of the enterprise, a matter of public concern. It is not suggested that the purpose or use of a railroad in Wisconsin differs from such purpose or use in other states. It is not claimed that the public control of that use is less complete there than it is elsewhere. No constitutional provision or legislative enactment peculiar to Wisconsin by which the nature of a railroad enterprise is changed, or the duties or obligations which the carrier operating the railroad

owes the public, are lessened from the duties or obligations which similar carriers owe in other governments, is even hinted at. The whole question is, what is a public use? Not a public use in Wisconsin or Michigan, but a public use under those general principles of jurisprudence common to all of the states. Clearly the answer to this question by the state courts is, in the absence of special provisions, constitutional or statutory, not such an interpretation of the local constitution or statutes as to be binding on the federal courts.

In Olcott *v.* The Supervisors, 16 Wall., 687, this court, in answer to the argument that it should follow the decision of the Wisconsin court upon this point, says:

"It is undoubtedly true in general, that this court does follow the decisions of the highest courts of the states respecting local questions peculiar to themselves, or respecting the construction of their own constitution and laws. But it must be kept in mind that it is only decisions upon local questions, those which are peculiar to the several states, or adjudications upon the meaning of the constitution or statutes of a state, which the Federal courts adopt as rules for their own judgments. That Whiting *v.* Fond du Lac County was not a determination of any question of local law, is manifest. It is not claimed to have been that. But it is relied upon as having given a a construction to the constitution of the state. Very plainly, however, such was not its character or effect. The question considered by the court was not one of interpretation or construction. The meaning of no provision of the state constitution was considered or declared. What was considered was the uses for which taxation generally, taxation by any government, might be authorized, and particularly whether the construction and maintenance of a railroad, owned by a corporation, is a matter of public concern. It was asserted (what nobody doubts,) that the taxing power of a state extends no farther than to raise money for a public use, as distinguished from pri-

vate, or to acomplish some end public in its nature, and it was decided that building a railroad, if it be constructed and owned by a corporation, though built by authority of the state, is not a matter in which the public has any interest, of such a nature as to warrant taxation in its aid. For this reason it was held that the state had no power to authorize the imposition of taxes to aid in the construction of such a railroad, and therefore that the statute giving Fond du Lac county power to extend such aid was invalid. This was a determination of no local question or question of statutory or constitutional construction. It was not decided that the legislature had not general legislative power; or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitutional construction. It is a quesion of general law. It has as much reference to the constitution of any other state as it has to the state of Wisconsin. Its solution must be sought not in the decisions of any single state tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no state court can conclusively determine for us. This consideration alone satisfies our minds that Whiting *v.* Fond du Lac County furnishes no rule which should control our judgment, though the case is undoubetedly entitled to great respect." Pp. 689, 690.

In townsite of Pine Grove *v.* Talcott, 19 Wall., 666, the court, speaking upon this same proposition says:

"The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgments of the courts where the cases arise. It must hear and determine for itself."

And see:

Perry *v.* Keene, 56 N. H., 514, 532, 538.

Town *v.* Venice *v.* Murdock, 92 U. S., 494.

Inhabitants of Worcester *v.* Western R. R. Co., 4 Metc., 564, 565.
Harding *v.* Godlet, 3 Yerg., 40, 52.
Leavenworth *v.* Miller, 7 Kas., 120, 155–6.

Whether a work is for the public good, and whether it may properly be assisted by the government as a public purpose, are largely matters of legislative discretion. While unquestionably the legislature cannot authorize the levying of taxes for the purpose of aiding in a private enterprise, it may render a work which is ordinarily private in its nature, public by the conditions and limitations imposed thereon, and by the supervisory power thereover which it retains in the government.

Says Judge Cooley:

"Taxes should only be levied for those purposes which properly constitute a public burden. But what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and where, under the pretense of a lawful authority, it has assumed to exercise one that is unlawful. Where the power that is exercised is legislative in its character, the courts can enforce only those limitations which the constitution imposes; not those implied restrictions which, resting in theory, the people have been satisfied to leave to the judgment, patriotism and sense of justice of their representatives."

Cooley's Const. Limitations, p. 155 (5th ed.).

Again:

"It must always be conceded that the proper authority to determine what should not constitute a public burden is the legislative department of the state. This is not only true of the state at large, but it is true also in respect to each municipality or political division of the state;

these inferior corporate existences having only such authority in this regard as the legislature shall confer upon them."

Cooley's Const. Limitations, pp. 604, 605 (5th ed.).

"We have conceded that taxes can only be levied for a public purpose . . . As to what is such a public benefit that it may be aided by the public, seems to be a question of public policy — of political economy — which must almost exclusively be determined by the legislature. And when the legislature have determined the question — when they have determined that a certain thing is of such great public benefit that it is public policy to aid it by taxation, — if the courts may still say that such is not public policy, and for that reason declare the act of the legislature unconstitutional, the courts must possess almost despotic power. If such is the correct doctrine, then there is an appeal from the legislature to the courts on mere questions of policy."

Leavenworth *v.* Miller, 7 Kas., 479, 539.

Says the supreme court of California:

"'Public use,' 'public purposes,' and 'public policy,' are much the same in import. 'Public policy' — the policy upon which the government affairs are conducted for the time being — is legislative policy in the main, and 'public use' and 'public purpose' are largely dependent upon this policy — notoriously varying in our country, from time to time, with the accession to power of political parties, differing from each other as to the system of measures best adapted to promote the interest of the state. The resolve of a legislative body, by which a tax is imposed, or private property taken, is, therefore, necessarily a legislative determination, that a public use is to be promoted by the tax, or taxing directed; and such a determination is the determination of a merely political question by the political department of the government.

"The legislature in the case before us, having determined

the construction of the contemplated road from Stockton to Visalia to be a matter of public concern, and as such authorized taxation to aid in the work, the question arises as to how far that determination is open to review in the courts. That question was answered by this court in the case of Napa Valley Railroad Company *v.* Napa County, 30 Cal., 437: 'Railroads concern the public interest as a matter of legal judgment, and however that conclusion may be opposed to the fact in the case at bar makes no difference, the action of the legislature on the question not being open to review by the judicial department of the government.'"

S. & V. R. R. Co. *v.* City of Stockton, 41 Cal., 147, 168–9.

And see:

Booth *v.* Boodbury, 32 Conn., 118, 128.
Speer *v.* School Directors, 50 Pa. St., 150.
Perry *v.* Keene, 56 N. H., 514, 532–3.
Goodin *v.* Crump, 8 Leigh, 120, 156.
Talbot *v.* Dent, 9 B. Mon., 526, 532.
Harding *v.* Godlet, 3 Yerg., 40, 52.
Brodhead *v.* City of Milwaukee, 5 Wis., 652.
Gibson *v.* Mason, 5 Nev., 281, 307.
Beekman *v.* S. & S. R. R. Co., 3 Paige Ch., 45.

And in Townsite of Burlington *v.* Beasley, 94 U. S., 310, this court held that a steam grist-mill which, under the statute, had been declared a public mill, was a work of such public interest as would support the exercise of the power of taxation to enable a municipality to donate bonds thereto. And so the supreme court of Tennessee held in Harding *v.* Godlet, 3 Yerg., 40, 52.

The act of congress of July 2, 1864, clearly indicates an intention on the part of congress to make the Northern Pacific Railroad a work of public benefit, and one which would support the exercise of the power of taxation by the municipalities through which it might pass. Thus

section 2 of the act, providing for right of way, states "the right of way shall be exempt from taxation within the territories of the United States."

Section 3 of the act grants to the company public lands for the purpose of aiding in the construction of the railroad and telegraph line, and to secure the safe and speedy transportation of the troops, munitions of war and public stores over the route of said line of railroad.

Section 7 confers upon the company the right to exercise the power of eminent domain.

Section 11 provides:

"That said Northern Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States, for postal, military, naval, and all other government service, and also subject to such regulations as congress may impose restricting the charges for such government transportation."

Sec. 17 "That the said Northern Pacific Railroad Company may accept to its own use any grant, donation, loan, power, franchise, aid or assistance which may be granted to, or conferred upon, said company by the congress of the United States, or by the legislature of any state, or by any corporation, person or persons; and said corporation is authorized to hold and enjoy such grant, donation, loan, power franchise, aid or assistance to its own use for the purpose aforesaid."

Sec. 20 "That the better to accomplish the object of this act namely: to promote the public interests and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefit of the same for postal, military, and other purposes, congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter, amend or repeal this act."

It is obvious that throughout this act the purpose of con-

gress was to create a corporation for the public benefit. The railroad constructed was to be primarly for governmental purposes. The exemption of the right-of-way from taxation in the territories is equivalent to a donation to the company of an amount of money to be raised by taxation equal to the taxes which would otherwise have been levied upon that right-of-way. By the act of April 10, 1865 (Special Laws of Wisconsin for 1865, p. 290), the state of Wisconsin vested the railroad company with all the "rights, powers, privileges and immunities within this state which were conferred by said act of congress upon them within the territories and jurisdiction of the United States." This legislative action by congress and by the state of Wisconsin is conclusive as to the character of the corporation and of the work to be performed by it. And this character of the corporation and the nature of the work to be performed by it, having been declared by an act of congress, the interpretation of that declaration involves the construction, not of a state statute, but of a federal law, and the federal courts are in no manner bound by the construction or interpretation which the state court may have placed upon that act. Whether or not the work done by this particular corporation is public or private must depend upon the charter of the corporation; the law of its being. The pivotal questions in this case must rest upon the interpretation and construction of that law, and that law is a federal statute.

POINT V.

The plea of former adjudication was not properly interposed, and is without merit.

By stipulation between the parties, by their attorneys, entered into May 22, 1894, long after the return of the transcript of record to the court, it was agreed that a certain paper described as "the original *proposed* supplemental

answer taken from the files of the U. S. Circuit Court for the western district of Wisconsin," might be filed in this cause and printed as a part of the record as if it had been originally returned therewith. P. Rec., 40. In accordance with this stipulation there is annexed to the record the paper refered to. This alleged supplemental answer was attemped to be filed Feb. 11, 1891, and sets out that the supreme court of Wisconsin rendered judgment May 20, 1890, in a cause wherein J. F. Ellis was plaintiff and the Northern Pacific Railroad Company was defendant, being the action referred to in appellant's original answer as penging; that the action was brought by Ellis to quiet title and remove the cloud created by the deed from the county to the railroad company which is the foundation of complainant's title in this action; and that by said judgment said court decided and determined the validity and legal effect of such deed, and of chapter 150 of the laws of Wisconsin for 1883; that such questions were necessarily involved in such action and were decided against the contention of said Northern Pacific Railroad Company; and said court held and determined that such deed and such state law were void. And these proceedings are urged as a bar of the right of the complainant here to litigate anew, or review in the circuit court, any of the points or questions so decided by the state court.

At the time this supplemental answer was filed the cause had been heard on bill and answer, and had been decided, it would appear, by the circuit court. The order setting the cause down for hearing on bill and answer was made Nov. 11, 1890. On Feb. 11, 1891, being the same day defendants attempted to file the supplemental answer, the court made an order reciting that the cause had been argued by counsel for the respective parties, and that a final decree be entered in favor of the complainant according to the prayer of the bill, with costs. The decree was drawn up and entered March 7, 1891. P. Rec., 33.

No application was made to file the proposed supple-

mental answer, nor was it in any manner allowed or considered by the court. The decree recites that the cause came on to be heard on the bill and answer of the defendants Roberts and Ellis, filed May 20, 1890, and was argued by counsel, etc. The supplemental answer was endorsed as follows by the clerk: "Supplemental answer, not allowed. Filed February 11, 1891." The time for answering expired on the 10th day of April, 1890, but it seems that it was in some way extended, as the original answer was filed May 20, 1890. P. Rec., 33, 40.

Although the supplemental answer was never properly in the record, and never in any manner considered by the court; although it was filed long after the original answer was due, and is in no manner a pleading in the case or entitled to any consideration, yet it will be readily seen that the so-called judgment which is attempted to be pleaded by the supplemental answer was simply the affirmance of an order overruling a demurrer, after which the case was remitted to the state court, an answer interposed, a final decree rendered, and an appeal again taken to the supreme court of the state.

The history of this litigation, in both the state and federal courts, as disclosed by the published decisions, is as follows:

In 1889, J. F. Ellis commenced a suit in the circuit court of the state for Douglas county, to quiet the title to a small portion of the lots contained in the deed from Douglas county to the railroad company, in which action he was named as plaintiff, and the railroad company as defendant. The defendant interposed a general demurrer to the complaint, and the demurrer was overruled by the lower court of the state, August 22, 1889. The railroad company took an appeal to the state supreme court, which was heard May 3, 1890, and the decision on the demurrer was affirmed May 20, 1890. This is the so-called "judgment" attempted to be pleaded by the supplemental answer. But before this decision had been made by the

supreme court of the state the federal circuit court in this cause had by its own decision of March 20, 1890, overruled the demurrers and pleas of the defendants herein. P. Rec., 27.

After the decision in the state supreme court sustaining the decision on demurrer, the railroad company, the defendant in the state court, answered setting up the contracts and resolutions herein appearing, and also pleading, by way of estoppel, the final decree of the federal circuit court in this cause. Upon the trial a decree was ordered for the plaintiff, Ellis, and the railroad company took a second appeal to the state supreme court. It was there contended on behalf of the railroad company that inasmuch as no final decree had been entered in the state court, that the final decree of the federal circuit court was *res adjudicata* upon the merits of the cause. The state supreme court, however, held that its decision affirming the order on demurrer, made May 20, 1890, was the first final decision between the two parties, and, although not carried into a decree, was yet *res adjudicata*, and being prior to the final decree in the federal circuit court, *although subsequent to its decision on demurrer*, the answer of the railroad company setting up an estoppel did not plead any defense. The theory of this decision was as follows: The decision on demurrer of the lower state court, made August 22, 1889, was not an estoppel or *res adjudicata*, because the order was not a final one, being subject to review on appeal from the final decree. Although the record pleaded in the answer in the state court showed that the federal circuit court had decided the demurrer in that court before any final decision on demurrer had been made in the state court, yet the supreme court of Wisconsin assumed that its decision on the demurrer, although later than that in the federal court, was binding upon the parties as an estoppel.

A writ of error from the supreme court of the United States to the state supreme court was then sued out by

the railroad company, on the ground that the state court had refused to recognize a federal decree; but the writ of error was dismissed, upon the ground that the decision in the state court was decided upon the question of *res adjudicata*, and that no federal question was therefore presented. The decisions of the different courts in respect to this case, in chronological order, are as follows:

N. P. R. R. Co. *v.* Roberts *et al.*, 42 Fed. Rep., 734.
Ellis *v.* N. P. R. Co., 77 Wis., 114.
Ellis *v.* N. P. R. R. Co., 80 Wis., 459.
N. P. R. R. Co. *v.* Ellis, 144 U. S., 458.

The dates of the various decisions and decrees are as follows:

August 22, 1889, decision of lower state court overruling the demurrer of the railroad company.

March 20, 1890, decision of federal circuit court overruling the demurrer of Ellis and Roberts. P. Rec., 27.

May 20, 1890, decision of state supreme court affirming decision of lower court overruling demurrer of railroad company.

November 11, 1890, order setting this cause down for hearing on bill and answer.

February 11, 1891, order for final decree in this cause.

February 11, 1891, supplemental answer attempted to be filed, but not allowed. P. Rec., 40.

November 17, 1891, affirmance in the state supreme court of the final decree in state court in favor of Ellis.

April 11, 1892, writ of error dismissed in this court.

It will be seen that upon the principles laid down by the supreme court of the state, in holding that its own decision on demurrer was *res adjudicata*, a prior decision on demurrer of the federal circuit court should have been *res adjudicata*, as it was rendered some two months before the like decision of the state supreme court.

The above history of this litigation has been given merely to show that the plea of estoppel attempted to be

set up in the supplemental answer could not possibly be sustained. However, it was perhaps unnecessary to do this, since the supplemental answer was never allowed in any manner, or in any way considered by the court, and is no more in the case than though no attempt had ever been made to file it. All that can be shown is, that the state court has decided one way, and the federal court, as well as all other courts who have passed upon the question, the other.

"Applications to amend an answer are not grantable of course, but depend upon the discretion of the court."

Carter *v.* Wood, Baldwin, 289.
Smith *v.* Babcock, 3 Sum., 583.
Bell *v.* Hall, 5 N. J. Eq., 49.

And being in the discretion of the court, only a clear case of abuse of discretion will justify a reversal of the action of the trial court in granting or refusing such leave. The record does not present a case of such abuse, even if it be assumed that it shows that such leave was refused, which, however, it does not show, since it does not appear that any application was made to the court. On the contrary, facts appear on the face of the record clearly justifying a refusal of such application.

Some showing in support of an application of this nature must be made, either by affidavit or by a proper verification of the proposed answer. No showing whatever was attempted here. The "proposed supplemental answer is unverified; and this fact alone is sufficient to justify the rejection of the application.

Smallwood *v.* Lewis, 13 N. J. Eq., 123, 125.

No notice of such application was ever given complainant. Such an application will not be granted on *ex parte* proceedings.

The unexplained failure of the defendants to set up this "proposed" defense, if such there is, until after the case had been set down for hearing and argued on the

bill and answer, although they knew every fact now proposed to be set up for months before, is such gross neglect as will fully justify refusal to allow the application.

In a case where the application for leave to file a supplemental answer was not made until the case had been set down for hearing, the court said.

"The application is too late, no grounds being suggested as a justification for the delay. Two months have elapsed since the reopening of the court, and ample time was afforded for making the application before the cause was set down for final hearing."

Smallwood *v.* Lewis, 13 N. J. Eq. 123, 124.
Macdongal *v.* Purrier, 4 Russ., Ch. 486.
Campion *v.* Kille, 14 N. J. Eq., 230, 232.

Applications of this nature are not looked upon with favor; and when an addition is to be put upon the record prejudicial to the plaintiff, they are granted only with great difficulty; and only where the ends of justice are thereby attained.

Calloway *v.* Dobson, 1 Brock., 122.
Western Reserve Bank *v.* Stryker.
Clarke's Ch., 380.
Campion *v.* Kille, 14 N. J. Eq., 230, 232.

And where, as here, the application is made solely for the purpose of defeating the rights which the federal courts hold good and protect, by setting up a judgment rendered in total disregard of the law, and which those courts reject as erroneous, the purpose being to defeat the ends of justice the court properly refused the leave asked for.

A defense of *res judicata*, in suits in equity, must be pleaded, either by special plea in bar or in the answer.

Lyon *v.* Talmadge, 14 John., 501, 511.
Turley *v.* Turley, 85 Tenn., 251; S. C., 1 S. W. Rep., 891, 894.

Galloway *v.* Hamilton, 1 Dana, 576, 577.
1 Beach Moden Eq. Prac., § 345.
Daniels Ch. Pr., 659, and note, 9,660 and note, 853 (5th ed.).

POINT VI.

Equity has jurisdiction to quiet the title to the lands in question.

The bill states that ten blocks and sixteen lots, parcel of the lands in controversy (describing them) are in the actual use, possession and occupancy of the complainant, and that in 1881 it constructed its railroad upon said blocks and lots, and has ever since used and occupied the same, for the purpose of maintaining and operating its railway. P. Rec., 14.

Each one of the three defendants demurred to the bill for want of equity; and two of the defendants, Roberts and Ellis, pleaded to the bill. In his plea the defendant *Roberts* set up that none of the lands mentioned in the bill, or any part thereof, the title to which was in him, were at the commencement of the suit, or at any time prior or subsequent thereto, in possession of complainantt. P. Rec., 25.

The defendant *Ellis* by a like plea, states that, at the same times mentioned in Roberts' plea, none of the lands in the bill owned by Ellis were in the complainant's possession. P. Rec., 22. There was no plea that the lands owned by *Johnson* were not in possession of complainant. The demurrers and pleas being overruled, the defendants answered, alleging that complainant was not in possession of any of the lands in question, *except* that the roadbed of its railroad crosses the ten blocks and sixteen lots above mentioned; and that the remaining part of said tract so crossed by said road, as well as the whole of the other tracts of land mentioned in the bill, are vacant and

unoccupied, and have remained so for more than ten years prior to the filing of the bill. P. Rec., 28.

It appears in the record that of these ten blocks and sixteen lots one lot and four blocks were owned by Ellis, two blocks by Roberts, and fifteen lots and four blocks by Johnson. There is therefore no plea in the record to the jurisdiction of the court in respect to four blocks and fifteen lots, being those owned by Johnson. In other words, the defense that the complainant had an adequate remedy at law has never been made in this record in any proper manner as to these lots and blocks owned by Johnson.

"If the objection of want of jurisdiction in equity is not taken in proper time, namely, before the defendant enters into his defense at large, the court, having the general jurisdiction, will exercise it. If a defendant in a suit in equity answers, and submits to the jurisdiction of the court, it is too late for him to object that the plaintiff has a plain and adequate remedy at law. This objection should be taken at the earliest opportunity. The above rule must be taken with the qualification that it is competent for the court to grant the relief sought, and that it have jurisdiction of the subject-matter."

1 Dan. Ch. Pr., 555, 4th Am. Ed., quoted with approval in Brown *v.* Lake Superior Iron Co., 134 U. S., 530, 536.

The situation then is this: The railroad company since 1881, long before the filing of the bill, has been, and still is, in possession of its roadbed upon ten blocks and sixteen lots, alleged, without denial, to be of the value of more than ten thousand dollars. Such possession of a part of these lots and blocks is possession of the whole, under the rule settled in Wisconsin.

Stephenson *v.* Wilson, 50 Wis., 95.
Wilson *v.* Henry, 35 Wis., 241.
Wilson *v.* Henry, 40 Wis., 594.

These were cases where the occupant merely carried on mining operations upon the land, and such was held to be possession of the whole tract or lot.

The balance of the lands outside of these ten blocks and sixteen lots have never been in the possession of any person, but are entirely vacant and unoccupied, so far as any *actual* possession is concerned, although, under the tax deeds, Douglas county, and thereafter the complainant, had the constructive adverse possession of these lands.

Lawrence *v.* Kenny, 32 Wis., 281, 290.
Knox *v.* Cleveland, 13 Wis., 245, 251.
Dean *v.* Early, 15 Wis., 100.
Hiles *v.* LaFlesh, 59 Wis., 465.
Coleman *v.* Peshtigo Lumber Co., 30 Fed. Rep., 317.

The complainant therefore has no remedy at law whatever, except that the statute of Wisconsin has extended the common law action of ejectment so that a person claiming title to land, not in his possession, may bring ejectment against a person setting up a claim thereto, although the land be vacant. But it is well settled in this court that such statutory extension of a legal remedy does not affect the equity jurisdiction of the courts of the United States.

"The test of equity jurisdiction in the courts of the United States — namely, the adequate remedy at law — is the remedy which existed when the judiciary act of 1789 was adopted, unless subsequently changed by congress, and is not the existing remedy in a state or territory by virtue of local legislation."

McConihay *v.* Wright, 121 U. S., 201.
Mississippi Mills *v.* Cohn, 150 U. S., 202.

We contend therefore that under the local statute of Wisconsin, as well as independent of any statute, this action will lie to quiet the title. The statute of Wisconsin at the time of the filing of this bill provided that any per-

son having possession and legal title to lands might institute an action against another person setting up a claim thereto to quiet the title thereof.

Sec. 3186 R. S., 1878.

The federal courts will give effect to such a state statute.

Holland *v.* Challen, 113 U. S., 15.
Chapman *v.* Brewer, 114 U. S., 171.
Reynolds *v.* Crawfordsville Bank, 112 U. S., 411.
U. S. *v.* Wilson, 118 U. S., 89.

The jurisdiction then as to these ten blocks and sixteen lots is perfectly clear, as we submit, under the state statute. And a court of equity, having once obtained jurisdiction, will go on and do complete justice between the parties, even though it may thus become necessary to decree on a matter which might be cognizable at law.

Cathcart *v.* Robinson, 5 Pet., 264.
Tayloe *v.* Insurance Co., 9 How., 390.
Ober *v.* Gallagher, 93 U. S., 199.
Kennedy *v.* Creswell, 101 U. S., 641.

By chapter 88 of the laws of Wisconsin for 1893, the legislature enacted as follows:

"Section 3186, of the Revised Statutes of 1878, is hereby amended so as to read as follows: Section 3186. Any person having legal title to land, may institute an action against any other person setting up a claim thereto, and if the plaintiff shall be able to substantiate his title to such land, the defendant shall be adjudged to release to the plaintiff all claim thereto, and to pay the costs of such action, unless the defendant shall, by answer, disclaim all title to such land, and give a release thereof to the plaintiff, in which case he shall recover costs, unless the court shall otherwise order. It shall be sufficient to aver in the complaint in such action the nature and extent of the plaintiff's estate in such land, describing it as accurately as may

be, and that he is in possession thereof, or that said land is vacant and unoccupied, and that the defendant makes some claim thereto, and to demand judgment that the plaintiff's claim thereto be established against any claim of the defendant, etc."

While this law was enacted after the decision of the United States circuit court in the case at bar, we submit that the supreme court will give effect to such statute precisely as if that statute had been in force at the date of the commencement of this action.

Independent of any statute, an action will lie to quiet title to vacant and unoccupied lands, in favor of the possessor of the legal title. The source of equitable jurisdiction was the inadequacy of the remedies afforded by the common law. Where the law will give no relief, or where the relief which it affords is less adequate, complete and perfect than that which can be had in equity, the right of the complainant to resort to equity for relief cannot be questioned. The test in every case is the adequacy of the legal remedies afforded. Justice Johnson, speaking for this court, says:

"It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity."

Sidway v. *Lawson*, (Ark.) 23 S. W. Rep. 648.
Scott v. *Duke*, 3 La. An. 253.
Larkans v. *Saffarans*, 15 Fed. Rep. 147 and note.
Railroad Co. v. *The County*, 39 Ia. 124, 150.
Santeyreac et al. v. *United States*, 7 Peters 222; 239.
Odum v. *Garner*, (Texas) 25 S. W. Rep. 18.
Lane v. *White*, 140 Pa. St. 99, 101.
Sutherland on Stat. Constr., Sec. 482.
Endlich on Inter. Stat., Sec. 288.

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Boyce's Executors *v.* Grundy, 3 Pet. 210, 215.

And see:

Watson *v.* Sutherland, 5 Wall., 74, 78.

Where land is vacant and unoccupied, the law affords no remedy.

In Holland *v.* Challen, 110 U. S., 15, this court, speaking of such vacant and unoccupied lands, says:

"An action for ejectment for it would not lie, as it has no occupant; and if, as contended by the defendant, no relief can be had in equity because the party claiming own-

ership is not in posession, the land must continue in its unimproved condition." P. 21.

In Lamb *v.* Farrell, 21 Fed. Rep., 5, the court says:

"In the case of unoccupied land, the law refuses its aid to any party for any purpose. It will not adjudicate the title or right of possession, nor will it remove a cloud. Whether one's title be legal or equitable, he is equally denied relief or redress at law, when the land is unoccupied. The want of an adequate remedy at law is as absolute as it is when the plaintiff has the actual possession. A cloud upon the title to unoccupied land is not less injurious to the owner than it would be if he was in possession; and the ground of his equity to have his title quieted and clouds removed is precisely that upon which jurisdiction is assumed and relief granted to owners in possession of their lands, viz., the law's inability to afford him a remedy." P. 9.

The complainant claims under a grant from the county of Douglas, made by special authority from the legislature. The effect of such a grant of vacant and unoccupied lands is to vest seizen in deed in the grantee, and that seizen attaches to the grantee all the remedies incident to the estate granted.

Green *v.* Liter, 8 Cranch, 229.

And this seizen vested in the grantee, having been undisturbed, still continues, and is sufficient to maintain an action of this nature.

Lamb *v.* Farrell, 21 Fed. Rep., 5, 9.
Lamb *v.* Burbank, 1 Saw., 227, 232.
G. R. & I. R. C. Co. *v.* Sparrow, 36 Fed. Rep., 210, 211.
Shirk v. Williamson (Ark.), 9 S. W., 307, 308.
Miller *v.* Leiman, 27 Ark., 233, 234.
Thompson *v.* Wolf, 8 Ore., 454, 455.
Pierre *v.* City of Fond du Lac., 38 Wis., 470, 481.
Branch *v.* Mitchell, 24 Ark., 431.
Smythe *v.* Henry, 41 Fed. Rep., 705.

Possession is not essential under the decisions of the Wisconsin courts to enable complainant to maintain an action to quiet his title. If the land be vacant and unoccupied so that the complainant has not an adequate remedy at law, a bill to quiet title will lie.

Pier *v.* City of Fond du Lac, 38 Wis., 470, 485.

This decision is conclusive evidence of the law of the state of Wisconsin upon this subject, and the federal courts will give effect to such law.

Lamb *v.* Farrell, 21 Fed. Rep., 5, 8.

It is respectfully submitted that the decree of the circuit court should be affirmed.

JOHN C. SPOONER,
Solicitor for Appellee.

James M. McNaught
F. M. Dudley.

Office Supreme Court, U.
FILED.
APR 16 1895
JAMES H. McKENNEY,
CLE

158-31

IN THE

Supreme Court of the United States.

Ex parte ROBERT W. BUCHANAN.

APPLICATION FOR WRIT OF ERROR.

To the Honorable Henry B. Brown, Associate Justice of the Supreme Court of the United States:

And now comes Robert W. Buchanan by George W. Gibbons, his attorney, and represents as follows:

That on the 14th day of August, 1893, the said Robert W. Buchanan was convicted before the Court of General Sessions of the Peace, in the City, County and State of New York, of the crime of murder in the first degree, for which he was indicted by a competent Grand Jury, and thereupon was sentenced by the Honorable Frederick W. Smyth, Recorder of said Court, to be executed under the forms prescribed by the laws of said State, for which warrant was issued by said Court to the Agent and Warden of the State Prison at Sing Sing, to be executed in the week commencing Monday, October 2, 1893.

That thereafter on the 16th of August, 1893, appeal from the said verdict was taken to the Court of Appeals of the said State of New York upon exceptions duly taken by defendant's counsel pending the trial and subsequent thereto, which appeal was heard upon argument of counsel for the prosecution and the defendant, and upon consideration of the same, the said Court of Appeals on or about the day of January, 1895, did affirm

the judgment of the said Court of General Sessions of the Peace, and remanded the case for its further action.

That thereafter on March 22, 1895, the said Robert W. Buchanan was arranged before said Court of General Sessions of the Peace, in the said City of New York and was then and there sentenced by the Honorable John W. Goff, Recorder, to be executed under the forms prescribed by the laws of said State of New York, the same to be carried into execution for the week commencing on the 22d day of April, 1895.

That said Robert W. Buchanan is now confined in said State's Prison in pursuance of such sentence and awaiting its execution.

Your petitioner respectfully represents and avers that he has not been justly tried and properly convicted and sentenced in that the same is in contravention of the provisions of the Constitution of the United States and of the Constitution of the State of New York, as follows:

1st. That your petitioner is sought to be deprived of life without due process of law.

2nd. That he was not tried by an impartial jury of the State and District wherein the crime was committed.

Your petitioner further alleges in support of his averments that, upon the trial of said case, one Paradise, one of the petit jurors empaneled therein became mentally incapacitated, and was not in condition, mental and physical, to be consulted and was not consulted by his fellow jurors while deliberating thereon—that by reason of his said mental and physical incapacity he was absent from the jury room for nearly three hours, separate and apart therefrom, and in company with a physician and another person then and there attending him—that others of the jury were allowed to separate and communicate with outside parties pending deliberations upon the verdict—that when finally called into court for the purpose of delivering the verdict of said jury, Paradise's mental and physical incapacity had not ceased, and he was still mentally and physically incapaciated from par-

ticipating in and rendering his assent to the verdict of said jury—and that therefore said verdict was not rendered by a competent and impartial jury. All of which petitioner avers will be shown by the record.

And your petitioner further represents that, notwithstanding the evident mental and physical incapacity on the part of said juror, Paradise, the Court refused to recognize the same and ordered that the said incapacitated juror be embraced with his fellow jurymen in considering and rendering their verdict, and thereby the jury was rendered partial and, in fact, the verdict emanated from only eleven jurors, of which the record duly attests, and whereof your petitioner is ready to submit record proof.

Wherefore, your petitioner prays that a writ of error and supersedeas may issue from the Supreme Court of the United States to the said Court of General Sessions of the Peace in and for the City and County of New York, and that all proceedings may be staid until the said Supreme Court shall hear and determine whether your said petitioner has been tried, convicted and sentenced in accordance with the provisions of the Constitution of the United States, and until the further order of the Court herein.

Your petitioner states that no previous application for writ of error or supersedeas has been applied for in this case, and that he is without other remedy.

And your petitioner will ever pray,

(Signed) ROBERT W. BUCHANAN,

BY GEO. W. GIBBONS,

His Attorney.

WASHINGTON, D. C.,
April 11, 1895.

DISTRICT OF COLUMBIA,
CITY AND COUNTY OF WASHINGTON, }

George W. Gibbons being duly sworn, deposes and says that he is the attorney for said petitioner, Robert W. Buchanan, and that the facts stated in the above application are true, as he verily believes.

(Signed) GEORGE W. GIBBONS.

Sworn to and subscribed before me this 11th day of April, 1895.

(Signed) FRED. W. PRATT,
[SEAL] *Notary Public.*

GEO. W. GIBBONS,
D. A. SPELLISSY,
Petitioner's Attorneys.

J. J. NOAH,
Of Counsel.

Let this petition be presented to the Supreme Court at its session on Monday, April 15th, instant.

(Signed) H. B. BROWN,
Associate Justice.

IN THE

IN THE

Supreme Court of the United S

EX PARTE

Robert W. Buch

Application for Writ of E and Supersedeas.

PETITIONER'S BRIEF.

GEORGE W. GIBBONS,
DENIS A. SPELLISSY,
Petitioner's Attorneys.

J. J. N

WASHINGTON, D. C.,
April 16, 1898.

IN THE

Supreme Court of the United States.

Ex parte
ROBERT W. BUCHANAN. } Application for Writ of Error and Supersedeas.

STATEMENT OF CASE AND BRIEF ON BEHALF OF PETITIONER.

Part I.

Application is made on behalf of Robert W. Buchanan to the Supreme Court of the United States for writ of error and supersedeas to the Court of General Sessions of the Peace for the City, County and State of New York, on the allegation that the said Robert W. Buchanan, who was convicted therein of the crime of murder and sentenced to death, to be executed under the forms prescribed by the laws of said State of New York for the week commencing on the 22nd day of April, 1895, is sought to be deprived of life without due process of law, and that he was not tried by a competent and impartial jury of the State and District wherein the crime was committed, and that therefore the said conviction and sentence was in contravention of and repugnant to the Constitution of the United States and also to the Constitution of the State of New York.

The ground upon which this allegation is made on behalf of said Buchanan is that one Paradise, one of the petit jurors

empanelled and serving in said case, became mentally incapacitated after the case had been given to the jury, and was not in condition, mental and physical, to be consulted or hold consultation with his fellow jurors in their deliberations upon their verdict; that the jury by which the said petitioner was tried, after hearing the charge of the Judge, not agreeing in court, retired for deliberation, and after so retiring and before rendition of the verdict, the said jurors were not kept together in a private and convenient place as required by the law of the State of New York, but were permitted to speak to and communicate with other persons and such other persons were permitted to speak to and communicate with said jurors without the order or permission of the court, contrary to the law of said State; that by reason of the said mental and physical incapacity of the said juror Paradise, he was separated from said jury for a considerable period in company with a physician and another person, and that the other members of the jury were allowed also to separate; that at the time of delivery of said verdict the said juror Paradise was still mentally and physically incapacitated from participating in the same; that the verdict did not emanate from a legally constituted and properly equipped jury, that therefore the same was without due process of law, and that the jury by which petitioner was tried and convicted was incompetent and partial, in that it was incomplete and irregular in its proceedings—this in violation of the provisions of the law of the State of New York.

The reception of the verdict was objected to for these causes by counsel for defendant at the time of its rendering and overruled by the court. Immediately thereafter a motion was made to set aside the verdict on the same grounds, and overruled, as was also a motion for a new trial.

The case was carried to the Court of Appeals, which Court affirmed the judgment of the Trial Court.

The issue herein, submitted, is whether the alleged incapacity of the juror and separation of and communications with the jury rendered the verdict repugnant to the provisions of the Con-

stitution of the United States, and presents a federal question warranting the interference of the Supreme Court of the United States.

The question concerning the incapacity of the juror, its extent and attending circumstances, together with its effect in operating, as alleged, to deprive petitioner of his life without due process of law, can only be established and determined by looking to the record proof, and to that the petitioner refers.

Part II.

The petitioner was indicted for murder in the first degree, by the Grand Jury of the City and County of New York, on the 9th day of June, 1892. He pleaded not guilty 10th June, 1892.

Trial of the indictment was entered upon March 20th, 1893, and continued until 26th April following, when the jury rendered a verdict of "guilty."

Thereupon petitioner's counsel moved for a new trial and for an arrest of judgment. He asked specifically that the verdict be set aside because it was rendered without proper deliberation on the part of the jury.

(Fol. 9537, page 2400 of printed case.)

Further specific grounds for an arrest of judgment were urged by petitioner's counsel, among them the following:

The mental and physical incapacity of Mr. Paradise, one of the jurors, as set forth upon the record.

Fol. 9650, page 2413.

The mental incapacity of said juror to concur in the verdict or to appreciate and fully understand the effect thereof.

Fol. 9651, page 2413.

Because in his then condition his participation in the verdict was not his voluntary act under the circumstances in which it took place. *Ib.*

Because during about two hours after the court had charged the jury and the latter had retired for deliberation and before they had rendered their verdict, said Paradise was irrational, delirious and subject to insane delusions, his reasoning faculties being entirely suspended and his condition one of metal aberration.

Fol. 9652, page 2414.

Because the condition of said Paradise rendered him incapable of reasoning and of appreciating the nature or consequences of his acts.

Fol. 9653, page 2414.

Because from the manner of bringing said Paradise into court after his said attack and sickness, and thereupon immediately calling him from the care of his accompanying physician to the jury box to join in the verdict, this act was rendered involuntary and was in effect coerced.

Fol. 9654, page 2414.

Because the trial judge erred when on learning the above condition of said juror he did not discharge the jury in accordance with the provisions of Section 416 of the Code of Criminal Procedure of the State of New York.

Fol. 9657, page 2415.

A motion was also made for a new trial upon several grounds, but embracing those above specified.

Fols. 9689 to 9697, pages 2423 to 2425.

And also because the verdict was not such as was contemplated by the Constitution of the United States or the constitution of the State of New York, in this, that it was not the verdict of a jury of twelve men of sound minds, memories and understandings.

Fol. 9699, page 2425.

In addition to those above enumerated all other grounds of exception were available to petitioner in the Appellate Court, the New York Code of Criminal Procedure providing that the Appellate Court may order a new trial if justice requires it, whether exceptions be taken or not in the court below.

Code Crim. Proc., Sec. 527.

And in capital cases appeals must be taken direct to the Court of Appeals from the Trial Court.

Ib., Sec. 517.

The proceedings and uncontradicted testimony in the case show that at the conclusion of the charge in the early evening of April 29, 1893, the jury retired for deliberation. The following morning they returned for the purpose of having some of the testimony read over to them and again retired. At 9.30 P. M. a sworn statement was taken in the Recorder's chambers in the presence of the district attorney and petitioner's counsel. This statement appears at length in the printed case. Fols. 9517 to 9535, pages 2380 to 2385. It was made by a physician having an office in the Astor House (to which hotel the jury was sent), who had been called upon to attend Juror Paradise at ten minutes of 8 that evening, and found him lying on the floor perfectly unconscious. He administered to him, bringing him around somewhat, when it at once appeared that the juror was laboring under a hallucination that he himself was accused of the murder by Buchanan.

Fol. 9521, page 2381.

The evidence of Dr. Stewart on these matters is not alone uncontradicted but is actually accepted by the learned Recorder, and the statements therein virtually adopted and promulgated by him as matters of established fact in his decision.

Fols. 10,268 to 10,271, page 2568; Fol. 10273, page 2569.

Thus it appears prominently in the case that, during at least a portion of the time of the jury's deliberation, Paradise was wholly deprived of his normal mental faculties, was laboring under insane delusions, was undoubtedly incompetent from mental incapacity. In none of the cases cited by the learned Recorder to show that a passing illness did not absolutely disqualify a juror are the circumstances parallel, for they relate to temporary *physical* ailments alone—severe aberrations, delusions or insanity do not appear as affecting the juror in any of these cases.

The opinion delivered in the Court of Appeals (145 New York Reports, 1), does not review nor comment upon the cases so cited. In dealing with this particular branch of the case (page 29) the learned justice who wrote the opinion sums the facts to be, "Paradise * * * was taken suddenly ill and *fainted*. A physician was called in who found him first unconscious and then delirious. He had him removed to another room, where he treated him professionally," and then goes on to briefly state what subsequently occurred before the verdict, adding, "Upon the facts as they were *made to appear* there was nothing to warrant the trial judge in refusing to receive the verdict."

145 N. Y. Reports, at p. 29.

No allusion was made by the Appellate Court to the delusions and hallucinations under which the juror Paradise labored.

Petitioner's Points.

I

The Fourteenth Amendment to the Constitution of the United States provides: "That no person shall be deprived of life, liberty or property without due process of law, and guarantees to every person the equal protection of the laws."

2

This amendment to the Constitution of the United States is comprehensive in its application.

> If it (due process of law) has no broader meaning than process prescribed by act of the Legislature, it is the end of the case. But such a construction would render the constitutional guarantee mere nonsense; for it would then mean no person shall deprive a person of life, liberty, or property unless the State shall choose to do so. It has repeated and uniformly been adjudicated that the terms "due process of law" and "the law of the land" have a broad and comprehensive meaning, and originated in that great bill of rights, *Magna Charta*, and operate as a restriction on each branch of civil government.
>
> In *re.* Ziebold, 19 Repr. (U. S. Circ.) 742.

3

There can be no question but this amendment (Article 14 Sec. 1) extends to and operates *ex proprio vigore* upon the legislatures and *courts* of every state to enforce and secure all the privileges, immunities and rights within its scope and purpose. Upon every trial for crime in Courts of Justice of the United States, and of every state it steps in to interpose the shield of the Constitution, to protect the privileges and immunities of every citizen, and the life, liberty and property of every person, against the forbidden violations.

Davis, P. J., in People *vs.* Williams, 35 Hun. (N. Y.) p. 523.

4

Trial by jury in all cases in which it has been heretofore used shall remain inviolate forever.

Constitution, State of New York, Article 1, Sec. 2.

5

The trial by jury in all cases in which it has heretofore been used, is to remain inviolate forever.

Part 1, Chap. IV, Sec. 8, Rev. Stat. of New York. (Known as "The Bill of Rights.")

6

By the jury is understood, a body of twelve men, selected according to law, for the purpose of deciding some controversy of issue on a matter of fact.

Bouvier's Inst. American Law, Sec. 3039.
1. Chitty's Criminal Law, 505.
2. Archibald's Crim. Pl. & Pr., 624.

7

No authority can, on any pretense whatsoever, be exercised over the citizens of this State, but such as is or shall be derived from or granted by the people of this State.

Sec. 1. Of "The Bill of Rights" *Supra*.

8

No member of this State can be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof unless by the law of the land or the judgment of his peers.

Ib. Section 7.

9

No person shall be deprived of life, liberty or property without due process of law.

Constitution of the State of New York, Article 1, Sec 6.

10

No person can be deprived of life, liberty or property without due process of law.

Bill of Rights, *Supra*, Sec. 13.

11

Due process of law undoubtedly means in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights.

Edwards, J., in Westervelt *vs.* Gregg, 12 N. Y. Rep., at page 209.

(*a*) It means the general law in its regular course of administration through the courts of justice.

Taylor *vs.* Porter, 4 Hill (N. Y.), 140.
Clark *vs.* Mitchell, 64 Mo., 564.
Atchison, &c. R. *vs.* Baty, 6 Neb., 37.
Hoke *vs.* Henderson, 4 Dev. (N. Car.), 15.
Jones *vs.* Perry, 10 Berg. (Tenn.), 59.

(*b*) The term refers to certain fundamental rights which that system of jurisprudence, of which ours is a derivative, has always recognized.

Brown *vs.* Levee Commiss., 50 Miss., 468.

12

Due process of law, when applied to legal proceedings, means a course of legal procedure according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights.

Pennoyer *vs.* Niff, 95 U. S., 714.

13

The New York Code of Criminal Procedure enacts:

> Sec. 358. The trial jury is formed as prescribed by the Code of Civil Procedure.

The New York Code of Civil Procedure prescribes (Sec. 1079):

> In order to be qualified to serve as a trial juror in the City and County of New York, a person must be * *
> 4. In the possession of his natural faculties, and not infirm or decrepit.
> 5. Free from all legal exceptions; intelligent; of sound mind and good character * * *

14

Not alone was this juror in the mental condition complained of, but he was actually dosed with brandy. The Courts of New York have been very severe in cases where spirituous liquors were used by jurors.

In People *vs.* Douglass, 4 Cow. 26, Judge Woodworth writing the opinion of the court, says:

> This (drinking spirituous liquor) should not be tolerated in any shape in the jury during the progress of the trial and we have unfortunately held that it reached the verdict in a civil cause even when the liquor was given by consent.

Judge Southerland said in the same case:

> There is no difference among us that the mere fact of drinking spirituous liquors is enough to set aside any verdict—where any one of the jury in the course of the trial drinks spirituous liquors, we will set aside the verdict on this ground alone.

In Rose *vs.* Smith, 4 Cow. 17, the Supreme Court said in setting aside the verdict:

> The circulation of spirituous liquors among the jury was of itself fatal.

These and many decisions of the same character have been followed in one of the most recent New York decisions.

Hanrahan *vs.* Ayres, 10 Miscellaneous Reports, 435.

15

The New York Code of Criminal Procedure prescribes a distinctly facile method of overcoming such difficulties as arose upon Buchanan's trial. Sec. 416 enacts:

> If before the conlusion of the trial a juror becomes sick, so as to be unable to perform his duty, the Court may order him to be discharged and another jury to be then or afterward empanelled.

16

It appears affirmatively that the seizure of the said juror Paradise by severe illness, which rendered him physically and mentally incapacitated from properly and intelligently performing jury duty, did cause the dispersement and temporary sepa-

ration of the jury. That said juror Paradise was severely stricken (not by a *faint*, as incidentally remarked by the Court of Appeals), but by entire prostration, and in consequence thereof the said jury were thrown into disturbance and did separate, are facts attested by the affidavit of Thomas E. Franceville, one of the trial jurors.

Fols. 9739 to 9741, pages 2435–36.

See also affidavit of Waverly E. Scott (Fols. 9726 to 9729, pages 2432–33), as modified in his second affidavit.

Fols. 9961 to 9963, page 2491.

The medical testimony shows beyond all peradventure that the symptoms of the illness affecting the said juror, Paradise, rendered him unable to properly weigh the grave issues of the case—that the juror's mind was not clear and sound, nor had been clear and sound for some time either previous or subsequent to his attack—that his hallucinations were the expression of a gradually deranged judgment which was temporarily suspended, and that he was not the creature of his own will, but of his unfortunate malady.

This medical testimony, and also the statement of the juror's son, Harry H. Paradise, made to the judge of the court—(see page 2385), pending his father's illness, indisputably show that the juror had been previously epileptic, and that the genesis of the juror's delusions were not a sudden occurrence, but a post-epileptic expression. (See affidavits of Doctor Allan McLane Hamilton, folios 9751–52–55–58, page 2438; Professor Landon Carter Gray, folios 9765 to 9771, page 2442; Professor William James Morton, folios 9787, 9789, 9790, 92–95–96, pages 2447–49; Professor Graeme M. Hammond, folios 9799, *et seq.*, p. 2450; also folios 9809, *et seq.*, p. 2453; Doctor Charles L. Dana, folios 9755 *et seq.* page 2439.

Petitioner's counsel in this Court have entered upon their duty only within the past five days, and have been able to find but two copies of the voluminous record presented to the Court

of Appeals. In view of the immense record in this case, it has been physically impossible for Petitioner's counsel to have mastered in so short a time the entire details of the case, since on application for writs of error and supersedeas, it has not been customary to make full presentation of all the law and facts.

This defendant is in prison awaiting execution. The hand of the electrocutionist is already outstretched to touch the key which will send him to eternity unless this Court shall intervene. He is without means and without friends. Surely the State of New York can better afford to defer this execution until further action of this Court shall be had, rather than assume the risk of taking life without due process of law. The testimony against this defendant was purely circumstantial in all relations, and so much the more reason that his every right, especially those guaranteed by the Constitution, should be rigidly guarded and preserved.

The writ, as prayed for, should issue.

All of which is respectfully submitted.

GEORGE W. GIBBONS,
DENIS A. SPELLISSY,
Petitioner's Attorneys.

J. J. NOAH,
Of Counsel.

IN THE

Supreme Court of the United States.

IN THE MATTER OF THE APPLICATION OF ROBERT W. BUCHANAN FOR A WRIT OF ERROR, ETC.

BRIEF FOR THE PEOPLE OF THE STATE OF NEW YORK.

The petitioner herein was tried in the court of general sessions of the peace of the city and county of New York upon an indictment charging him with the murder of his wife by poison on the 22d day of April, 1892. The trial commenced March 20, 1893, and was concluded on the 26th day of April following, by the rendition of a verdict of guilty. Seven days were occupied in the selection of a jury. The trial was an unusually protracted one, the evidence very voluminous on both sides and mainly circumstantial in its character.

Several hundred exceptions were taken by the petitioner's counsel during the progress of the trial to the rulings of the trial judge in the admission and rejection of evidence and in charging the jury and refusing to charge as requested, and at its conclusion and before sentence was passed a motion for a new trial was made upon these exceptions and also upon the alleged improper separation of the jury after the case was submitted to them without the permission of the court, and on the further ground that after the case was

submitted to the jury and before the verdict was rendered the juror Paradise became so ill as to be physically and mentally incapable of performing his duty as a juror, and that the jury should therefore have been discharged.

It was urged in support of the motion that the trial court erred—

(1.) Because the incapacity of the juror Paradise, as set forth in the record on the evidence of Dr. William H. Stewart, indicated that the juror was not in condition to deliberate with his fellow-jurors upon the evidence, nor to properly appreciate and weigh the importance and effect of the verdict.

(2.) Because the juror was not in a mental condition to concur in rendering the verdict.

(3.) Because, in view of his condition, the bringing of him into court with his fellow-jurors and compelling him to go through the form of rendering a verdict rendered the verdict, so far as he was concerned, coercive and involuntary.

(4.) Because the juror, from ten minutes of 8 o'clock until fifteen minutes past 10, was, according to the testimony of Dr. Stewart, part of the time unconscious and suffering with apparent convulsions, a part of the time delirious and having insane delusions, during which period his reasoning faculties were suspended.

(5.) Because the evident condition of his mind from ten minutes of 8 o'clock rendered him incapable of reasoning, reflecting, deliberating, or appreciating the character, quality, nature, or consequence of any mental act, and deprived him of the power of mental purpose and the control and rational exercise of thought and will.

(6.) Because the bringing of the juror into court under the circumstances, to wit, bringing him from the Astor house in a carriage only in the companionship of Dr. Stewart, and separating him from his fellow-jurors, calling him to the jury-box, deprived his act of every voluntary tribute.

(7.) Because, upon its appearing upon the record from the evidence of Dr. Stewart that the juror Paradise was ill and incapacitated for the performance of the duty devolved upon him, the court should have ordered him to be discharged and another jury to be then and there impaneled to try the indictment herein, according to the provisions of section 416 of the Code of Criminal Procedure, and not have accepted said verdict or assumed verdict.

(8.) Because, upon its appearing as aforesaid that the said juror, Paradise, was ill and incapacitated from the discharge of the duty devolved upon him, the court should have discharged the jury impaneled in accordance with the provisions of subdivision 1 of section 428 of the Code of Criminal Procedure.

In the 66th specification of his motion the defendant urged before the trial court that "*the verdict of the jury is not such a verdict as is contemplated by the Constitution of the United States* or the constitution of the State of New York. The only verdict recognized thereunder is that of a jury of twelve men of sound minds, memories, and understandings, which this verdict is not."

Case on Appeal, folio 9699.

The proceedings upon the motion and all the affidavits used thereon will be found at folios 9700–10215; from which the following facts appear:

The jury retired to deliberate upon their verdict on the afternoon of April 25. On the morning of April 26 they

returned to court, when, in accordance with their request, the testimony of Doctors McIntyre and Thomson and Mr. and Mrs. Warren was read to them. They then retired (f. 9515).

Before they went to supper, and about seven o'clock on the evening of the 26th, they had agreed upon a verdict of murder in the first degree (f. 9827).

The learned recorder not being in the building, they were taken out to supper, in accordance with his orders, by the officers in charge, and were conducted to the Astor house, where they sat down to dinner in a room which was upon a hall on the other side of which was the dining-room of the hotel. No one was permitted in this room while the jury were at supper, except the waiters and the court attendants (ff. 10171).

The room in which they had dinner was very hot, and about eight o'clock the juror Paradise, being overcome with the heat and fatigued, fainted away. He was immediately carried into a reception-room near by by two of the court attendants, several of the jurors assisting. There he was laid upon the floor and a doctor sent for. A proper room having been secured, the juror was carried upstairs, three jurors in charge of a court attendant accompanying and assisting him. The other jurors remained downstairs in charge of court attendants. (Ff. 9827, 10174.)

The circumstance was immediately reported to the court, who sent for the physician, and Dr. Stewart, on his arrival at the court-house, in the presence of the district attorney and the counsel for the defendant, was sworn by the learned recorder, who, after examining him himself, permitted both the district attorney and counsel for the defendant to examine him.

The substance of his testimony (ff.9517–9535) was that he found the juror lying on the reception-room floor unconscious; that he thought it was a fainting spell and gave him some brandy as a stimulant. The juror then soon

opened his eyes, called for his wife, and asked where he was. He was then carried upstairs to room No. 7, his clothing was loosened, and he was laid upon the bed, with ice cloths upon his head. He then began calling again for his wife, and cried out that he didn't poison the woman, and said that last Sunday Buchanan came to him and told him he had poisoned his wife. To quiet him the physician gave him an eighth of a grain of morphine. The physician further testified that he thought the attack was due to nervous excitement; that it would be dangerous to bring him to court, and that he was not then in a condition to rationally discuss a matter connected with the life and death of another. In answer to the question of the recorder, the physician said that he could not say just then when the juror would be able to come to court, but that he might be able to do so in the course of an hour or so (f. 9535).

Harry H. Paradise, a son of the juror, aged 18, was then sworn and examined by the recorder. He testified that his father was nervous, but always actively engaged in business; that he had fainted once or twice before, and that he was not a drinking man (ff. 9537–9561).

Being directed by the recorder, Dr. Stewart returned to the hotel to ascertain the condition of the juror, his son accompanying him, counsel for the defendant stating that he had no objection to his son going over to see his father (f. 9565).

At 10.15 Dr. Stewart returned and stated to the court that he found the patient so much better that, in his opinion, if he was kept quiet for an hour he believed he would be able to come to court and discharge his duties in a rational manner. He was then examined by Mr. Brooke, who drew from the doctor the opinion that the juror was not then in a condition to deliberate and pass upon any grave question, not on account of his mental but his weakened physical condition (ff. 9580–9583).

The physician having stated that the safety of the juror

required him to be brought to court in a carriage, the court so ordered, and at 11 o'clock the juror Paradise started from the hotel in a carriage, accompanied by the doctor and a court attendant, while the other eleven jurors, in charge of other court attendants, walked to the court-house. There they were joined by the juror Paradise, and all twelve walked into the court-room and took their respective seats in the jury-box (f. 10179).

On their arrival in court the physician stated that, in his opinion, the juror was now in a mental condition to perform his duties and to understand fully what he was about (f. 9585). The court thereupon stated to the jury that, from the report of the physician, he was satisfied that the juror who was so suddenly afflicted was now in a condition to perform the duties imposed upon him by law, but thought it safer, under the circumstances, that they should again retire and confer before rendering their verdict (f. 9588).

The jury thereupon retired, and in a short time returned with a verdict of murder in the first degree (f. 9596).

The jury were then polled and severally confirmed their verdict (f. 9597).

The proofs submitted by the defendant in support of his motion for a new trial on the ground of a separation of the jury consisted of the sworn statement of Dr. Stewart, before quoted, and the affidavits of Thomas B. Barrett, a night watchman in the Astor house (f. 9719), Waverly E. Scott, a hall man in the same hotel (f. 9727), and Thomas E. Franceville, one of the jurors in the case (f. 9733).

The affidavit of the juror Franceville could not properly be received to impeach or impair his verdict.

Dalrymple *vs.* Williams, 63 N. Y., 361.
Williams *vs.* Montgomery, 60 N. Y., 678.

But it is to be noted that the allegations of his affidavit do not disagree with the facts of the affidavits submitted by

the prosecution, with the exception that he asserts that, while he did not go up to the room where juror Paradise lay, several of the other jurors did, not in a body, but two or three at a time. He also alleges that lady and gentlemen guests of the hotel and another person, said to be a *Herald* reporter, lingered about the jury, and that those of the jurors who were not running backward and forward to and from his room were either lingering about the alcove or wandering about the corrider of the hotel, and that one of the jurors was missed and was seen coming from the direction of the stairs which led down to the bar-room (ff. 9739–9741).

Barrett, the night watchman, testified that when they carried the sick man up to room No. 7 some of the jurors remained downstairs in a little alcove room, and some went up with the doctor; that they were constantly running backward and forward to the sick man's room, not in a body, but singly or in twos or threes, and one of them went downstairs and around the hall in the direction of the bar and closet several times alone (f. 9722).

Walter E. Scott, the hallman, testified that while the sick man was lying upstairs in room No. 7 the jurors were roaming about the hallway near a little alcove room, where the office used to be, and some would run up to the sick man's room, leaving the others, and some remained upstairs with him (f. 9728).

Both of these affiants subsequently made affidavits, which were read by the prosecution in opposition to the motion. In his affidavit Barrett testified as follows:

"I do not know whether the men who were running backward and forward to the sick man's room, singly or in twos or threes, were court officials or whether they were in the presence of or in charge of a court officer, nor do I know whether the person whom I saw go downstairs or around the hall in the direction of the bar and water-closet several times alone was a court officer or not" (f. 9967).

Scott testified:

"I have read the affidavits sworn to on the 11th day of May, 1893, by me herein, and I did not intend to say that the jurors were roaming around the hallway near the little alcove, but I did intend to say that they were roaming around in the alcove room. The only time that I saw the jurors in the hallway was when they went from dinner into the alcove room and when a number of the jury went upstairs with the sick man" (f. 9962).

The charges of irregularity contained in these several papers were disposed of upon the motion by affidavits of ten of the jurors and of all of the court officers who were in attendance upon the juror. (The affidavits of these jurors are to be found from folios 10001 to 10127 of the Record.)

They agree in declaring that those jurors who went up to see Juror Paradise and those who were downstairs were always in charge of the court officers; that none of the jurors were alone at the time or seen coming from the direction of the stairs leading down to the bar-room and public closets of the hotel; that from the time the jury retired to deliberate no communication or remark was made to the jury or to any of them in reference to the case except when the jury were alone and all together, and that from the time Juror Paradise fainted no communication whatever was had with any of the jurors remaining downstairs except by the court attendants or fellow-jurors, and no communication was had with any of the said jurors in reference to the case by any person, and that during the entire time of their service no reference was made to the case or any discussion had upon it except when the jury were alone or all together.

The affidavits of the several court attendants are to be found between folios 10135 and 10191.

Charles Wund, one of the court attendants, testified that the juror Paradise fainted about 8 o'clock, and that, accompanied by five of the jurors, all in charge of Court Attendants Cullen, Glennon, and the deponent, he was carried, some of

the jurors assisting, into the reception-room; that the six other jurors remained in the dining-room in charge of Court Attendant Trott; that after the sick juror was laid upon the floor two of the jurors returned in charge of the deponent to the dining-room to finish their supper, leaving three of the others upstairs with Juror Paradise, in charge of Officer Cullen. In about ten or fifteen minutes all of the jurors except the three upstairs had finished their dinner, and immediately went into the reception-room. The deponent left the jurors in the reception-room in charge of a court attendant and went upstairs to the room where Juror Paradise was lying. With the assistance of the three jurors he then carried Paradise into room No. 7 of the Astor house, and laid him upon the bed. He then went downstairs with Juror Bopp and got Paradise's hat, cane, and umbrella. After remaining about five minutes he went downstairs with Bopp and joined the body of the jury, returning in a few moments to the room where Paradise was lying in the presence of a court attendant and the two jurors who had remained.

From time to time, several of the jurors expressing a desire to see how Paradise was, the officer accompanied them upstairs to his room and returned with them. Later on he went up and brought down the two jurors who had remained with Paradise and a court attendant. The whole jury were then together, Paradise having recovered consciousness and expressed a desire to walk to court. They were about to start for the court-house when the doctor stated that Paradise had better ride in a carriage. All of the jurors walked downstairs together. Paradise entered a carriage, accompanied by the deponent, drove to the court-house, met the other jurors, and walked into the court-room.

Officer Wand further states that from the time juror Paradise fainted until he joined the eleven other jurors all conversations had in the hearing of the deponent were only

with regard to his health, and the conversations afterward of all persons who came into his room were confined to questions about his condition. Officer Wand further states that during all the time he had charge of the jury none of the jury left the reception-room except to go upstairs in his charge, and each of the jurors who went upstairs returned in his charge, and that there was no juror who went downstairs or around the hall in the direction of the bar or water-closet. This affidavit is corroborated in all particulars by the affidavits of all the other court officers.

Juror Franceville, having been requested by the district attorney to state the name of the juror whom he alleged was missed and afterward seen coming from the direction of the public bar-room, replied in writing that he could not recollect the name of the juror (f. 10211).

The provisions of the New York Code of Criminal Procedure, under which this motion was made, are as follows:

SECTION 465. "The court in which a trial has been had upon an issue of fact has power to grant a new trial when a verdict has been rendered against the defendant by which his substantial rights have been prejudiced, upon his application in the following cases:

Subdivision 3. "When the jury have separated without leave of the court after retiring to deliberate upon their verdict, or have been guilty of any misconduct by which a due and fair consideration of the case has been prevented."

Section 428 of the code provides:

"After the jury have retired to consider their verdict they can be discharged before they shall have agreed thereon only in the following cases:

"When upon the occurrence of some injury or casualty affecting the defendant, the jury or some one of them, or the court, rendering it inexpedient to keep them longer together." * * *

Section 416 of the code provides:

"If, before the conclusion of the trial, a juror becomes sick, so as to be unable to perform his duty, the court may order him to be discharged and another jury to be then or afterward impaneled."

The questions arising upon this branch of the motion were therefore: First, Did the jury separate without leave of the court after retiring to deliberate upon their verdict, or were they guilty of any misconduct whereby the substantial rights of the defendant were prejudiced? Second, Did the court err in refusing to discharge the jury because of a casualty affecting the juror Paradise which rendered it inexpedient to keep them longer together, and was the juror Paradise so sick as to be unable to perform his duty, thereby rendering it the duty of the court to discharge the whole twelve?

It is quite evident that on the state of facts shown no separation of the jury by which the substantial rights of the defendant were prejudiced was made out, nor was there any evidence of misconduct on the part of the jury by which a fair and due consideration of the case was prevented.

Under section 416 of the code, before quoted, it became the duty of the court to investigate the cause of the juror's illness, but the court was not empowered to discharge the jury except in case of such an illness as rendered the juror unable to perform his duty.

Under section 428 of the Code of Criminal Procedure the court has no power to discharge the jury except upon the occurrence of some injury or casualty affecting the defendant, the jury or some one of them, or the court, rendering it inexpedient to keep them longer together.

Under these sections the temporary and passing illness of a juror does not constitute a sufficient reason for discharging

the jury. His illness must be of such a character as would render him unable to perform his duty after a reasonable time, and only when that fact is established to the satisfaction of the court is the case of inexpediency mentioned in the statute made out.

The facts in this case showed that the illness of the juror was temporary only. Within two hours and a half of the time when he fainted he was entirely himself again, anxious to walk to court; walked through the court-house with the other jurors into the court-room, answered his name, retired with the other jurors to deliberate, returned to the court-room, and, when polled, gave his individual verdict. Nothing more happened to him than might have happened to any man who had been engaged in jury service for four weeks, who had been shut up for two days and one night in a jury-room, and who found himself without food in a hot and oppressive atmosphere. The promptness of his recovery shows how slight and transient his illness really was. The accident to this juror and the involuntary separation of the jury consequent upon it would not have constituted, even under the common law, such a separation as required the discharge of the jury.

"If one of the jurymen be taken ill during the trial, though of a capital offense, so as to be incapable of agreeing in the verdict, or die, the jury may be discharged, though the evidence of the crime is nearly gone through, and the prisoner must be tried afresh."

"If a juryman be taken ill another juryman may be permitted by the court to attend him, accompanied by a bailiff sworn to remain constantly with him, and on his return he may himself be questioned on his oath to make true answers to such questions as the court may demand of him as to the state of the individual whom he has left; and if it appear from his evidence that there is a probability of the juror speedily recovering he may be allowed proper refreshment, but if there be no probability that he will be able to return to pursue his duties a new panel may be ordered,

returnable instanter, upon which all the others are competent to serve."

1 Chitty, Crim. Law, p. 269.
Regina *vs.* Newton, 6 Carr. and Kew, 85.
Rex. *vs.* Barrett, Jebb's Crown Cases, 104.
Rex. *vs.* Scalbert, 2 Leeche's Crown Cases, 706.
Regina *vs.* Beere, 2 Moody & Robertson, 472.
Rex. *vs.* Edwards, 4 Taunton, 309.

In Commonwealth *vs.* Clew two jurors were taken ill after the jury had retired to deliberate upon their verdict. They were confined over a day, apparently without refreshments. A physician was appointed to visit the jurors in their room, and after examination reported that the life of one juror was not in immediate danger, but that he was ill and that his health would be endangered if he continued to remain in his present state of privation, whereupon the court discharged the jury. On appeal this was held to be error. Gibson, C. J., held that food and refreshment should have been furnished to recuperate their forces, and that it is only in the absence of a probability to perform his duties on the part of the sick juror that a new panel may be ordered.

Commonwealth *vs.* Clew, Sergt. & Rowle, 503.

In Goersen *vs.* Comm., 106 Penn. St., 477, after the retirement of the jury on a murder trial, one of them was taken ill. He was put in bed in a communicating room and a physician was summoned to attend him there, not speaking to the others at all nor to him on the subject of the trial. It appearing that the prisoner sustained no injury, it was held that the verdict was not vitiated.

In Nichols *vs.* Nichols, 126 Mass., 256, the court adjourned from Friday until Monday, leaving the jury in charge of an officer, with instructions to discharge them when they agreed. One of the jurors was taken sick with a chill and furnished with brandy by the officer. Another juror fell upon the floor in a fit. A physician was sent for, who ad-

ministered to the juror, and he recovered. The jury afterward agreed upon a verdict. On appeal the court said:

"The question of the effect of the introduction of the physician into the jury-room for the purpose of giving medical aid and relief to the juror who appears to have stood in pressing need thereof is not free from difficulty. It is, however, obvious that a merely temporary attack of sickness, though it may for the time being incapacitate the juror, is not necessarily ground for the discharge of the jury. It is proper when the circumstances will admit to await the result and see if, within a reasonable time, he so far recovers as to enable the trial to proceed or a verdict to be returned. If such sickness is brought to the attention of the court while the jury are deliberating upon their verdict and medical attention appears to be necessary, the better way ordinarily would seem to be for the court to select a suitable physician and to caution him in advance not to converse with any of the jury upon the case except such as may be connected with the immediate relief of the disorder. The court must have the power in its discretion to allow suitable and necessary medicine and medical attention to be furnished to the jury, and, indeed, it is his plain duty to see that such are furnished in cases of urgent need. In the present case, the judge was not accessible at the time, but nothing appeared to have been done differently from what may well have been ordered by him. The officer and physician were both competent as witnesses to testify as to the extent of their communication with the jury, and there is no reason to suppose that either of them said anything to any juror which in any way bore upon the case under consideration, or that the courses of substantial justice were to any extent perverted by what occurred. This was a matter especially for the presiding judge to investigate. In the various emergencies which are liable to occur, irregularities must occur sometimes. While the court will always seek to guard against them, and especially to keep the jury as far as possible from all influence which can cast a suspicion upon the integrity of their verdict, nevertheless, it ought not to be suffered to grant a new trial on account of irregularities not attended with any intentional wrong and where it is made substantially to appear that the party complaining has not and could not have sustained any injury from them."

The involuntary separation of the jurors in this case, caused by the illness of the juror Paradise, did not prejudice the defendant in any respect, and it is well settled that unless there be satisfactory proof of some prejudice resulting to the defendant in consequence of any irregularity on the part of the jury the verdict is not vitiated.

People *vs.* Draper, 28 Hun., 1.
People *vs.* Montgomery, 13th Abb. Pr., 207, 230.
Eastwood's case, 3 Parker's Cr. Pr., 25.
People *vs.* Hartung, 4 Parker's Cr. Pr., 256.

The defendant, however, also sought to establish that the fainting spell of the juror Paradise was not an occasional, temporary, and transient sickness, but a manifestation of a nervous disease which rendered him incompetent to discharge his duty as a juror for many hours before it occurred and for many hours afterward, and insisted, therefore, that he had been deprived of that fair and impartial trial and deliberation upon the evidence to which he was entitled.

The proof to support this branch of the defendant's motion was made up in the following manner:

The defendant procured the affidavit of John H. Welch, who testified that on the 3d day of May, 1893, about two o'clock in the afternoon, a man came into his store, No. 271 Greenwich street, in the city of New York, and observed, "That gentleman (referring to Mr. Rockfeller, who had just left the store) remarked that he would not hang anybody on circumstantial evidence in a murder case. I just came off the jury in the Buchanan case." Welch then said to him, On what ground did you convict Buchanan? The stranger then said that he was Mr. Paradise, and that he did not acquiesce in the verdict; that he was taken sick at the Astor house; that he was unconscious; that he did not vote to convict, although the rest of the jury said he did. He also said that he had told the recorder, the district attorney, and the counsel for the defense. He added that the jury had accused him in the

jury-room of being bribed before they went out; that he could give references for his character; that he had lost his situation on account of the trial, and that ex-Mayor Grant had been to see his employers to get it back for him.

This statement of Mr. Welch was partly corroborated by the affidavits of Bernard Redican and Theodore Vollman (ff. 9702–9717).

Thomas R. Barrett, the night watchman, swore that when he saw Juror Paradise he seemed ill, suffering apparently from convulsions, twitching violently all the while, and requiring the strength of three or four men to hold him (f. 9721).

These affidavits and the statement of Dr. Stewart and Mr. Paradise, the son of Juror Paradise, were submitted to Dr. Allen McLane Hamilton, Dr. Charles S. Dana, Dr. Landon Carter Gray, Dr. William J. Morton, and Dr. Graeme M. Hammond. No one of these physicians had ever seen Juror Paradise, and, as we shall soon show, the affidavits of Welch and his corroborators were rank perjury, for Juror Paradise was not even in the city of New York on the 3d day of May, 1893, and had never been in Welch's store in his life; yet, on this collection of affidavits, these physicians made affidavits in turn to the effect that in their opinions Juror Paradise was a confirmed epileptic; that his attack was of an epileptic nature, and that if by any chance he did not happen to have epilepsy he surely had general paresis (ff. 9747–9821).

These extraordinary opinions required a minute and thorough investigation of the life, history, habits, and health of the juror; of his business and domestic relations and of his movements immediately after the trial, and compelled him, at the request of the district attorney, to submit to an examination by leading alienists in the city of New York for the purpose of ascertaining whether there was anything in his whole history which justified the astounding imputa-

tion that he was afflicted with some form of nervous disease or insanity.

The juror himself submitted two affidavits, in the first of which he gave a full account of his illness, stating that the atmosphere of the dining-room was hot and oppressive; that he had had such fainting spells before in his life, but at considerable intervals; that they had nothing to do with his mental condition; that he regained consciousness at 9 p. m. and at 10.30 p. m. felt himself entirely able, both mentally and physically, to perform his duties as juryman; that he proposed to walk to the court-house, but was instructed by the doctor to ride; that after he had gone to the court-room and retired with his fellow-jurors he wrote his conclusions down upon a slip of paper in their presence, which were the same as he had expressed twenty-four hours before, and that when he left the room he went home and afterwards attended regularly to business.

He further testified that he had no communications whatever with reference to the case except with the jurors when they were alone and all together, and that such conversations as he had with the doctor, his son, and the other jurors when he was in bed in the Astor house related solely to the state of his health (ff. 9823, 9824).

In his second affidavit he states where he was born, when he arrived in this country, and his various occupations prior to the 16th of May, 1884, when he entered the employ of Mr. Schram, with whom he had been associated in business ever since. He denied the statements of John H. Welch; stated that he had never been in his store in his life, and that on the 3d day of May, 1893, he was in Louisville, Ky.

He further stated that on leaving the court-room he went home, slept awhile, went to business the next day, and on the day after left New York for Louisville, Ky., where he remained until about 8 p. m. on the 3d day of May. He

then gives in great detail his itinerary until his return to New York on the second day of June.

He then states that he has had four fainting spells in his life, none of which lasted more than an hour and a half; recites the causes of them, and avers that they had no effect whatever on his mental condition; that at the time of the rendering of the verdict he was as rational and intelligent as he ever was in his life, fully understanding his duty and responsibility, and that the only physicians who had treated him since he had been in New York were Dr. Charles Schram and Dr. Reuben L. Pritchard.

In support of his affidavit he submitted letters to his wife and his employer, addressed from the various cities through which he traveled on his business trip.

Dr. Pritchard and Dr. Schram both made affidavits to the effect that they had known the juror for many years past; that they had found him always perfectly rational, sober, and intelligent; that he had never manifested any symptoms of epilepsy or other nervous disease, and that such occasional nervous spells as he had had in no way affected his intellect either before or after the spells had passed.

The son of Juror Paradise testified that the only conversation he had with his father at the Astor house on the night of his illness was to inquire about his health.

Richard Schram, the juror's employer, made affidavit to the effect that the juror had been employed by him for nine years; had always found him intelligent, sober, and rational, and that he had such confidence in him that in his absence he gave him power of attorney to act in his stead.

Dr. Alexander E. McDonald, of Ward's island, general medical superintendent of the New York City Asylums for the Insane; Dr. Carlos F. McDonald, president of the State Commission of Lunacy, and Dr. Moses Allen Starr, professor of diseases of the mind and nervous system at the College of Physicians and Surgeons in the city of New York, made a thorough and careful examination of the juror, in com-

pany with Doctors Pritchard and Schram, obtained from him and them a full and detailed history of his life, health, and habits, and occasional and insignificant illnesses, subjected him to a close physical and mental examination, and after taking into consideration all that occurred on the night of the 23d of April, 1893, at the Astor house and in the court-room, and the statement of the attending physician certified that in their judgment Juror Paradise was a fairly healthy man; that he had never at any time in his life been the subject of epilepsy or epileptiform attacks; that he was of sound mind, in full possession of all his faculties, and that he had never at any time suffered from any mental disease; that he had no signs of mental disease whatever; that the attack from which he suffered on April 23, 1893, was of the nature of syncope, due to nervous exhaustion; that it did not interfere in any way with his mental capacity or powers of judgment before the time of the occurrence, and that within a short time after its occurrence he was undoubtedly as mentally sound and capable of the exercise of judgment as before its occurrence (ff. 9955–9998).

It also appeared that John H. Welch was an acquaintance of the defendant, Robert W. Buchanan, of several years' standing, and that he had frequently been on drinking bouts with him in various saloons in the city of New York (ff. 10199–10207).

No more conclusive answer could possibly be made to the cruel imputation cast upon this juror by the affidavits submitted by the defendant. The proof submitted by the district attorney in reply, however, left the question of his mental condition absolutely free from all doubt. Very great pains were taken by the prosecuting officer to make the answer thorough, complete, and overwhelming, because of the cruel injustice which was done to a citizen who had performed a long and laborious public service by statements published broadcast throughout the country that the soundness of his mental condition was even suspected.

The motion for a new trial was denied, the learned trial judge rendering a very comprehensive and carefully written opinion, wherein, after expressing his conclusion that no error was committed in his rulings upon the trial prejudicial to the interests of the defendant or in refusing to discharge the jury because of its alleged improper separation, he decided as a question of fact, upon all the evidence before him, that the juror was *not* physically or mentally incapable of performing his duty as a juror and that no error was committed in refusing to discharge the jury before it had rendered its verdict.

This opinion will be found in volume IV of the case on appeal, folios 10216–10360.

On the 10th day of August, 1893, the petitioner was sentenced to the punishment of death, to be executed in the manner and form prescribed by the laws of the State of New York, upon a day within the week commencing Monday, the second day of October, 1893.

Case on appeal, folios 10378–10380.

On the 17th day of August the petitioner filed a notice of appeal from this judgment with the clerk of the general sessions, whereby, by force of the statute, the execution of the sentence was stayed pending the determination of the appeal by the New York court of appeals.

The appeal was argued before the court of appeals on the 21st day of January, 1895, and on the 26th day of February, 1895, the court handed down a decision affirming the judgment.

The opinion of the court was written by Mr. Justice Gray and in it all the members of the court concurred.

145 New York Reports (official series, etc., advance sheets, pamphlet number 94, March 2, 1895), pp. 1, 7–32.

Mr. Justice Gray, before considering the exceptions, says (pp. 7, 8): "The examination of this very large record has been carefully made and a patient and conscientious consideration given to the facts elicited upon the trial and to the points made by the skillful counsel for the defendant in his effort to procure a new trial. It is our judgment that nothing appears upon the record which would justify us in reversing the conviction."

Concerning the separation of the jury, he says, after reciting the facts (p. 30): "Upon these proofs it was discretionary with the trial court to order a new trial or not, and with the exercise of its discretion we will not interfere (Code Crim. Proc., sec. 465, subd. 3). It was a question of fact, and I think the judicial discretion of the learned recorder was well exercised in having regarded the involuntary separation of the jurors as working no possible prejudice to the defendant."

After briefly referring to the facts relative to the juror's illness, he says (pp. 31, 32):

"The recorder in denying a new trial had before him the conflicting opinions of the experts, the facts stated in the affidavits, and those within his own observation. It cannot be said that the defendant made out a case of mental incompetency in the juror. While the opinions of the physicians secured by him seemed to give support to his theory of a mental or nervous disease in the juror which incapacitated him to deliberate or confer upon his case, they were not based upon any personal examination, but were premised upon the statements given them. In view of the evidence as to his physical and mental condition, upon actual examination, as to the facts of his past life and of his condition for weeks after the trial, the learned recorder could not well have decided otherwise than he did, and I think we must agree with him that the opinions of the experts for the people were warranted by the evidence, and that those of the defendant's experts were not. The elaborate opinion which he delivered upon the denial of the motion for a new trial contains a conscientious and able review of the question and is perfectly satisfactory."

After the affirmance of the judgment, the time originally fixed for its expiration having long since passed, the court below caused the petitioner to be brought before it and duly appointed the week commencing Monday, the 22d day of April instant, as the week within which the judgment should be executed.

The petitioner now moves for a writ of error and alleges that—

"He has not been justly tried and properly convicted and sentenced in that the same is in contravention of the provisions of the Constitution of the United States and of the constitution of the State of New York, as follows:

"1st. That your petitioner is sought to be deprived of life without due process of law.

"2d. That he was not tried by an impartial jury of the State and district wherein the crime was committed.

"Your petitioner further alleges in support of his averments that upon the trial of said case one Paradise, one of the petit jurors empaneled therein, became mentally incapacitated and was not in condition, mental and physical, to be consulted and was not consulted by his fellow-jurors while deliberating thereon; that by reason of his said mental and physical incapacity he was absent from the jury-room for nearly three hours, separate and apart therefrom, and in company with a physician and another person then and there attending him; that others of the jury were allowed to separate and communicate with outside parties pending deliberations upon the verdict; that when finally called into court for the purpose of delivering the verdict of said jury, Paradise's mental and physical incapacity had not ceased, and he was still mentally and physically incapacitated from participating in and rendering his assent to the verdict of said jury, and that therefore said verdict was not rendered by a competent and impartial jury. All of which petitioner avers will be shown by the record.

"And your petitioner further represents that, notwithstanding the evident mental and physical incapacity on the part of said juror, Paradise, the court refused to recognize the same and ordered that the said incapacitated juror be embraced with his fellow-jurymen in considering and rendering their verdict, and thereby the jury was rendered

partial, and, in fact, the verdict emanated from only eleven jurors, of which the record duly attests and whereof your petitioner is ready to submit record proof." (Petition, pp. 2, 3.)

FIRST.

The allegations of the petition are not supported by the record. The proof before the trial court amply established the facts to be directly the contrary to the contention now made. The trial court so found, and the court of appeals of the State of New York, upon a review of the facts, has upheld its finding. The application should therefore be denied upon the merits.

SECOND.

There is no Federal question involved in the case justifying a review by this Court. It is well settled that a writ of error will not lie unless, not only is some Federal question involved, but the question sought to be raised thereon has been properly presented to the State court for its consideration.

Spies *vs.* Illinois, 123 U. S., 131.
Miller *vs.* Texas, 153 U. S., 535.
McNulty *vs.* California, 149 U. S., 645.
O'Neill *vs.* Vermont, 144 U. S., 323.
Brown *vs.* Massachusetts, 144 U. S., 573.
Fielden *vs.* Illinois, 143 U. S., 452.
Leeper *vs.* Texas, 139 U. S., 462.

First. There was no claim made upon the trial nor in the court of appeals that the petitioner was "sought to be deprived of his life without due process of law."

The only reference in the entire record to rights under the Federal Constitution is that above quoted, viz., the sixty-sixth ground of the motion for a new trial, being a

naked assertion that the verdict was "not such a verdict *as is contemplated* by the Constitution of the United States," etc. (folio 9699).

This, we submit, was not the assertion of a claim that any right of the defendant guaranteed him by the Federal Constitution had been violated.

If such a general statement can be made the basis of review here, *every* criminal prosecution under State laws may be in the same way brought before this Court; and all that will be necessary will be for counsel to interject somewhere in the course of the proceedings on the trial some *claim*, however indefinite, that the defendant's rights under the Federal Constitution are being violated. Surely such a condition was never contemplated.

Second. The Federal Constitution does not insure every defendant tried for a violation of State laws "a trial by an impartial jury," etc. This provision, as has been repeatedly decided, applies only to Federal prosecutions.

THIRD.

The fourteenth amendment prohibits a State from depriving a person of life, liberty, or property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws.

This provision simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all their citizens in the enjoyment of an equality of rights was originally assumed by the States and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the Federal Government is limited to the enforcement of this guaranty.

It does not require that the State shall secure infallibility in the practical administration of its laws; nor can its failure to do so in any particular case be deemed a denial of the equal protection of the laws.

"Due process of law" means such an exercise of the powers of government as the settled principles of law permit and sanction, and under such safeguards for the protection of individual rights as those principles prescribe.

The petitioner has been tried and convicted of a capital crime under the statutes of the State of New York, as to the constitutionality of which no question is made. The allegations of his petition have been determined to be unfounded by the courts of that State, and their decision thereon is, by the well-settled law, final.

No Federal question is involved in the case justifying a review by this Court.

CONCLUSION.

We therefore respectfully submit that the petition for a writ of error and *supersedeas* should be dismissed.

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